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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNION OIL COMPANY OF CALIFORNIA, a corporation
Petitioner,

v.

The Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III, their engines, boilers, tackle, apparel and furniture; and STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation,
Respondents.

Relevant docket entries in the proceedings below:

1968

Jan 2 Filed Complaint in Rem and in Personam

Jan 16 Filed Summons with Marshal's returns showing service on January 12, 1968

Feb 20 Filed Answer and Cross Complaint of defendants and cross-plaintiffs

1969

Feb 18 Filed Motion of plaintiff for separate trial on segregated issue of liability.

Mar 5 Entered order allowing motion on segregated issues of liability

Mar 10 Record of court trial

July 3 Filed and entered opinion

Dec 30 Filed and entered judgment that plaintiff have judgment against the debts in the sum of $43,145.32 plus interest in the amount of $2,629.36; dismissing claim of cross-plaintiffs and cross-defendants with prejudice.

1970

Jan 28 Filed notice of appeal by Tugboat San Jacinto, Barge Oliver J. Olson & Company, counsel notified

Mar 4 Filed and entered order extending time 30 days within which time to file record on appeal.

Apr 27 Filed April 17, 1970, certified transaction of record on appeal in 2 volumes; Vol. I, pleadings Vol II, Reporters transactions, original and 1 copy. Filed original depositions, docket fee paid, cause docketed and entered, appearances of counsel

Oct 11 Argued and submitted to (C,W,CJJ & McNichols, DJ)

Dec 2 Ordered opinion (Wright) filed & judgment to be filed and entered

Dec 2 Filed opinion "Her statutory fault renders the Santa Maria liable for half damages. The judgment of the district court should be modified to hold both vessels at fault, and the damages divided. Remanded to the district court to ascertain appellants' damages."

Dec 2 Filed and entered judgment

1971

Dec 13 Filed original and three appellee's (Union Oil) application for stay of W

Dec 16 Filed application and order (W) granting Stay of Mandate to January 13, 1972

1972

Jan 6 Issued certified copy of record to Clerk SC for certiorari,

Jan 7 Issued original copy of reporter's transcript to Clerk SC for certiorari

Mar 3 Filed certified copy of SC order granting petition for writ of certiorari

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The relevant opinions below are contained in Appendices A and B to the Petition for Writ of Certiorari.

The decision in question is contained in Appendix B to the Petition for Writ of Certiorari.

Supreme Court of the United States

No. 71-900 ---, October Term, 19--

Union Oil Company of California,

Petitioner

v.

The Tugboat San Jacinto, et al.

ORDER ALLOWING CERTIORARI. Filed February 28 ---------- , 19 72

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ---------- Circuit is granted.

FILED
JAN 11 1972
E. ROBERT SEAVER, CLERK

In the Supreme Court
of the United States

OCTOBER TERM 1971

No. 71-900

UNION OIL COMPANY OF CALIFORNIA,
a corporation,

Petitioner,

v.

The Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III, their engines, boilers, tackle, apparel and furniture; and STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court
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OCTOBER TERM 1971

No._____

UNION OIL COMPANY OF CALIFORNIA,
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Union Oil Company of California, a corporation, prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been officially or unofficially reported; the full text of the opinion appears in the Appendix (A. 26).

The opinion of the United States District Court for the District of Oregon is reported at 304 F. Supp. 519 (D. Or. 1969). A copy of this opinion appears in the Appendix (A. 19).

In both the District Court and the Circuit Court this case was consolidated with, considered, and determined together with a companion case entitled "Star & Crescent Towboat Company, a corporation, and Oliver J. Olson & Company, a corporation, Cross-Plaintiffs, v. Union Oil Company of California, a corporation, and the Tanker SS Santa Maria, Cross Defendants."

JURISDICTION

The judgment sought to be reviewed is dated and was entered of record on December 2, 1971.

The statutory provisions believed by petitioner to confer jurisdiction upon this Court to review the judgment in question are 28 U.S.C. § 1254 and 28 U.S.C. § 2101(c).[1]

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[1] Reprinted in Appendix at 37-38.

QUESTIONS PRESENTED FOR REVIEW

1. Does Article 16 of the Inland Rules, 33 U.S.C. § 192, which provides that "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed," permit a court of appeals to adopt a rule that a vessel navigating near a fog bank must proceed at a speed which would enable her to be stopped in one-half the distance between her and a point along her projected course at which she might collide with any vessel emerging from the fog on any course?

2. Does the admiralty rule of equal division of damages apply to a collision in which one vessel has been flagrantly negligent while the other vessel has committed a minor statutory infraction which may not even have been a contributing cause of the collision?

STATUTORY PROVISIONS INVOLVED

The following federal statutes relevant to this petition are set out in the Appendix: 28 U.S.C. §§ 1254, 1333(1) and 2101(c); 33 U.S.C. § 192.

STATEMENT OF THE CASE

A. Statement of facts

This case involves a collision on the Columbia River between petitioner's tanker, the Santa Maria, and a barge towed by respondent's tug, the San Ja-

cinto, after the tug made an abrupt U-turn in front of the tanker. The District Court absolved the Santa Maria from any blame and found the San Jacinto in violation of numerous rules of navigation (A. 21-23). The Court of Appeals reversed, holding the Santa Maria liable for half damages on the ground that it violated the moderate speed in fog rule (A. 36).

The tanker was proceeding upriver at night at half speed, approximately 7 knots. It was on the Oregon side of a narrow channel, and although there was patchy fog on the Washington side, the visibility upriver was one and one-half to two miles. The pilot of the tanker sighted the tug, both visually and on radar, more than a mile ahead, proceeding downriver on the Washington side. The tug then disappeared into a patch of fog, and the tanker pilot assumed it would continue downriver. The master of the tug, however, became disoriented in the fog, and, believing the tanker had veered to the Washington side of the river, executed a sharp left U-turn *toward* the tanker in an attempt to run away from it. The crew of the tanker spotted the tug emerging from the fog just as it was commencing its turn. The tanker immediately put its engines in reverse and sounded danger signals. The tug completed its turn ahead of the tanker, but the barge it was towing swung around and smashed into the tanker's port bow, driving the tanker aground.

B. Basis for federal jurisdiction

This being a civil case in admiralty, District Court jurisdiction was founded upon 28 U.S.C. § 1333(1).

REASONS FOR ALLOWING THE WRIT

I

A writ of certiorari should be granted in this case because the Court of Appeals for the Ninth Circuit has rendered a decision on an important question of maritime law which is in conflict with decisions of other courts of appeals and the United States Supreme Court. The question involves interpretation of that part of Article 16 of the Inland Rules, 33 U.S.C. § 192, which reads:

> "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions."

Since the statute itself does not define moderate speed, the Court of Appeals has declared the term, as it applies to a ship immersed in a fog, to mean " 'a speed at which she [can] be stopped dead in the water in one-half the visibility before her.' " (A. 30). Where, as in this case, a ship is navigating near fog,

> ". . . the speed and visibility calculations must be performed: '. . . with reference to the distance within which she could be brought to a stop in the water, before *any* course of *any* vessel emerging from the fog on either side would cross her projected course along the fog bank at its nearest point.' *The Silver Palm*, 94 F.2d 754, 767 (9th Cir. 1937) (emphasis in original)." (A. 31).

This judicial gloss on Article 16 is acknowledged by the Court of Appeals to be in conflict with the de-

cision of the Fifth Circuit Court of Appeals in *Hess Shipping Corp.* v. *SS Charles Lykes*, 417 F.2d 346 (5th Cir. 1969) aff'd. on reh. en banc, 424 F.2d 633, cert. den. 400 U.S. 853, reh. den. 400 U.S. 931 (A. 34). The Court of Appeals decision also is in conflict with decisions in the Second Circuit,[2] the Third Circuit,[3] and this Court.[4] The rule adopted by these courts is that moderate speed is relative and depends upon the circumstances of each case. "The standard of moderate speed as set forth in the statute is necessarily vague. Moderate speed, while less than full speed, is a relative term which depends upon the circumstances of each case. *Polarus S/S Co.* v. *T/S Sandefjord*, 1956 A.M.C. 1779, 236 F.2d 270 (2nd Cir. 1956)." *Hess Shipping Corp.* v. *SS Charles Lykes*, 417 F.2d at 349. "What is a moderate speed in a given situation must, of course, depend upon the facts of the particular case if regard is to be had for 'the existing circumstances

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[2] See *Polarus S/S Co.* v. *T/S Sandefjord*, 236 F.2d 270 (2d Cir. 1956), cert. den. 352 U.S. 982; *The Bayonne*, 213 F. 216 (2d Cir. 1914); *Villain & Fassio E. Compagnia* v. *Tank Steamer E. W. Sinclair*, 207 F. Supp. 700 (S.D. N.Y. 1962), affd. 324 F.2d 563; *Skibs A/S Siljestad* v. *S. S. Mathew Luckenbach*, 215 F. Supp. 667 (S.D. N.Y. 1963), affd. 324 F.2d 563.

Judge Learned Hand specifically points out the conflict between circuits and criticizes the Ninth Circuit rule in *Oil Transfer Corp.* v. *Westchester Ferry Corp.*, 173 F. Supp. 637, 639 (S.D. N.Y. 1958).

[3] See *The Bohemian Club*, 134 F.2d 1000 (3d Cir. 1942), rev'd on other grounds, 320 U.S. 462; *Cf. Norscott Shipping Co.* v. *Steamship President Harrison*, 308 F. Supp. 1100 (E.D. Pa. 1970).

[4] See *The Pennsylvania*, 86 U.S. 125 (1874); *The Chattahoochee*, 173 U.S. 540, 19 S. Ct. 491, 43 L. Ed. 801 (1899); *The Umbria*, 166 U.S. 404, 17 S. Ct. 610, 41 L. Ed. 1053 (1897).

and conditions'." *The Bohemian Club*, 134 F.2d 1000, 1002 (3rd Cir. 1942).

This objective approach was mandated by this Court in *The Pennsylvania*, 86 U.S. 125, 133 (1873):

> "What is [moderate] speed may not be precisely definable. It must depend upon the circumstances of each case. That may be moderate and reasonable in some circumstances which would be quite immoderate in others."

The Court's view was reaffirmed in an opinion by Justice Brown, an acknowledged admiralty authority, in *The Chattahoochee*, 173 U.S. 540, 19 S. Ct. 491, 494, 43 L. Ed. 801 (1899):

> "No absolute rule can be extracted from these cases. [The Court examined English and American cases involving excessive speed.] So much depends upon the density of fog and the chance of meeting other vessels in the neighborhood, that it is impossible to say what ought to be considered moderate speed under all circumstances."

See also *The Umbria*, 166 U.S. 404, 17 S. Ct. 610, 41 L. Ed. 1053 (1897). This is also the rule in England. See *The Bharatkhand*, (1952) 1 Lloyd's List L.R. 470.

Ironically, the Ninth Circuit's half-distance rule seems to have originated in a misinterpretation of *The Chattahoochee* and *The Umbria*. See *The Silver Palm*, 94 F.2d 754, 757 (9th Cir. 1937). Presumably *The Silver Palm* derived the rule from the following statement:

> "It has been said by this Court in respect to

> steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law."[5]

The Chattahoochee, 19 S. Ct. at 494; see also *The Umbria*, 17 S. Ct. at 616.[6] However, it is clear from reading these opinions that the Court did not intend to lay down a mechanical rule which would relieve courts of their duty to scrutinize all of the circumstances of each case. For example, in *The Umbria*, Justice Brown commented on the rule that a vessel approaching another vessel in a fog should maintain her course (Id. at 613):

> "But although I entirely agree that that is a good general rule to lay down, yet the rule must be interpreted in each case according to the circumstances of that case. It is impossible to lay down an abstract rule of that description which shall be applicable to all circumstances, to all parts of the seas, and to all positions of vessels."

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[5] If indeed this language were the provenance of the half distance rule it would render the rule inapplicable to this case, since the San Jacinto was not "going at the moderate speed required by law." The trial court found the San Jacinto in violation of Article 16 in proceeding at an unreasonable speed (A. 23). This finding was not questioned by the Court of Appeals.

[6] *The Umbria* and *Chatahoochee* have also been cited for the proposition that moderate speed means "the lowest rate of speed consistent with good steerage way." *The Chattahoochee*, 19 S. Ct. at 494. However, this dictum has been properly recognized as being merely a reference to one of the circumstances which must be taken into account in deciding a case. See *Polarus Steamship Co.* v. *The T/S Sandefjord*, *supra*, note 2 at 272.

There is no reason to suppose that the Court took a different view of the moderate speed rule.

In addition to this conflict, the half-distance rule suffers from three serious deficiencies. First is its rigidity. The Court of Appeals maintains that the rule takes from the hands of pilots the discretion as to what is reasonable under the prevailing conditions and imposes "a formula to fit all circumstances." (A. 35). But this reasoning ignores the view of this Court that "in cases of this kind . . . something must be left to the judgment and discretion of the master," *The Umbria*, 17 S. Ct. at 615, and that Article 16 gives a navigator "discretion as to what shall be 'moderate speed' in a fog . . . ." *Lie* v. *San Francisco and Portland Steamship Co.*, 243 U.S. 291, 37 S. Ct. 270, 272, 61 L. Ed. 726 (1917). Despite the Court of Appeals' assurances, the half-distance rule does not fit all circumstances because it fails to take account of such variables as the location of the vessels (here a narrow channel), the conditions of the atmosphere, wind and weather, the size, weight and maneuverability of the vessel, the manner in which she was designed to go astern, her available steam and engine power, whether she has single, twin or multiple screws, her type of steering gear, the likelihood of meeting other vessels in the area,[7] whether the vessels are meeting head-on or on intercepting courses, and whether a change in course to avoid collision rather than a reversal of en-

[7] See *The Chattahoochee*, 173 U.S. at 548.

gines is feasible.[8] See Marsden's *Collisions at Sea* (10th Ed.) 479, 481; also *Robinson on Admiralty* (1939) 817.

Failure to consider all of the circumstances has produced a particularly harsh result in this case. Petitioner's ship, the Santa Maria, was proceeding upriver, on its own side, at half speed (approximately 7 knots), in visibility forward of one and one-half to two miles. The Santa Maria's pilot sighted, both visually and on radar, the San Jacinto over a mile away proceeding downriver on the opposite bank and assumed, quite reasonably, that she would continue downriver. As this Court has observed, "there is a point . . . beyond which precautions are unnecessary, and the master has the right to assume that he has shaken off the other vessel; . . ." *The Umbria*, 17 S. Ct. at 612. The Santa Maria's continued speed of 7 knots presented no danger to the San Jacinto. See *The Nacoochee*, 137 U.S. 330, 339, 11 S. Ct. 122 (1890). There was no risk of collision until the San Jacinto made an abrupt, unexpected and unlawful turn across the bow of the Santa Maria.[9]

Perhaps the most serious objection to the half distance rule from a mariner's point of view is that it is confusing, complicated, and in some cases unworkable. The general version of the rule, that a ship in fog must be able to stop within one-half the forward visi-

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[8] Considerations of space prevent a fuller discussion of this argument.

[9] A ship is not obliged to anticipate improper navigation. *Great Lakes Dredge & Dock Co.* v. *The Santiago*, 155 F.2d 148, 150 (2d Cir. 1946).

bility, is simple enough. But the rule stated in this case with respect to ships operating *near* a fog is more complicated. "[S]peed and visibility calculations must be performed: '. . . with reference to the distance within which she could be brought to a stop in the water, before *any* course of *any* vessel emerging from the fog on either side would cross her projected course along the fog bank at its nearest point' " (A. 31), is not a self-explanatory formula.[10] The Court of Appeals itself avoids applying this formula to the facts and instead decides that the relevant distance is 900 feet, the distance separating the vessels when the Santa Maria first saw the tug emerging from the fog (A. 30). This produces a maximum lawful stopping distance of 450 feet. While there is no evidence of the stopping ability of the Santa Maria, it is fair to assume that a tanker over 500 feet in length with a 17,000 ton load would have to be proceeding at a virtual snail's pace in order to stop in less than its own length. If the speed required happens to be less than bare steerageway, then the Santa Maria could have safely complied with the half-distance rule *only by dropping its anchor at the first sight of the San Jacinto. What is more, the rule might have obliged the San Jacinto to do likewise upon sighting the Santa Maria!* Surely such a result, which would produce

[10] For an illustration of the complicated charts, diagrams, and tabulations called for by this formula, see the opinion in *The Silver Palm*, 94 F.2d 754 (9th Cir. 1937). Presumably the Court felt that these calculations are readily performable by a pilot while maneuvering his ship in reduced visibility.

chaos especially on inland waterways, was not intended by Congress when it enacted the statute.[11]

Finally, the Ninth Circuit's half-distance rule violates the principle of uniformity in admiralty rules that is so essential to maritime operations. Congress has expressed a "strong concern" for uniformity in admiralty rules. *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 401, 90 S. Ct. 1772 (1970). Moreover, Article 16 applies not only to inland waters but is an *international* rule as well.[12] See 33 U.S.C. § 1077. If different jurisdictions adopted substantially different interpretations of this rule the resulting confusion would be intolerable. It is imperative that nautical rules of the road be the same regardless of the judicial circuit in which a ship's master finds himself—if he even *knows* which circuit he is in. Thus it is of extreme importance for this Court to review this case and reaffirm the rule set out in *The Pennsylvania*, *supra*, and followed by all other circuits which have applied Article 16, as well as England, that what is

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[11] For an indication of legislative intent underlying Article 16 see note 12 *infra*.

[12] Article 16 was adopted by the International Marine Conference of 1889. In addressing the conference with respect to this Article, the United States delegate said:

> ". . . [I]n the flexibility of this rule is its safety. Its flexibility permits a man to adapt his speed according to circumstances; and the duty which is put upon him by this rule is that he shall comply with it according to the circumstances under which he finds himself placed. . . . So you will find it impossible to lay down a definite rule as to what moderate speed means under all the different and differing circumstances in which vessels will find themselves placed."

Quoted in *Knight's Modern Seamanship* (10th Ed. Rev. 1941) 387.

"moderate speed" depends upon the "existing circumstances and conditions" of each case.

II

Also involved in this case is an American rule of admiralty which, almost from its very adoption by this Court over a century ago, has been criticized as primitive and unjust. We refer to the rule of equally divided damages, which directs that where two vessels collide as a result of the negligence of both, damages will be divided equally regardless of comparative fault. *The Schooner Catharine* v. *Dickinson*, 58 U.S. (17 How.) 170 (1854); *The Atlas*, 93 U.S. 302 (1876). The severe inequity of this rule has perhaps never been more acutely demonstrated than in this case. The fault of the San Jacinto in travelling at an unreasonable speed in a fog, in failing to give appropriate signals, in failing to maintain a proper lookout, in making a U-turn across the path of the Santa Maria and in failing to keep the barge it was towing under control (A. 22), was termed by the Court of Appeals as "flagrant and shocking" (A. 36). The fault of the Santa Maria, on the other hand, is questionable; at most it amounted to, in the words of the District Court, a "possible technical violation" (A. 24-25). Yet whatever the fault of the Santa Maria, *neither of the Courts below found it to be a contributing cause of the collision.*[13] Equal division of dam-

[13] The oppressiveness of the divided damages rule is exacerbated in this case by its association with the rule of *The Pennsylvania*, 86 U.S. 125 (1874), which requires the

ages in such a situation is manifestly unjust.

The rule of divided damages has been criticized repeatedly by lower federal courts as "unfair," *Ahlgren* v. *Red Star Towing and Transp. Co.*, 214 F.2d 618, 620 (2nd Cir. 1954), "illogical," *Marine Fuel Transfer Corp.* v. *The Ruth*, 231 F.2d 319, 321 (2nd Cir. 1956), "egregious," *Ulster Oil Transport Corp.* v. *The Matton No. 20*, 210 F.2d 106, 110 (2nd Cir. 1954) (Learned Hand, dissenting), "unjust," *Tank Barge Hygrade* v. *The Gatco N.J.*, 250 F.2d 485, 488 (3rd Cir. 1957), "antiquated," *National Bulk Carriers, Inc.* v. *United States*, 183 F.2d 405, 410 (2nd Cir. 1950), cert. den. 71 S. Ct. 89 (Learned Hand dissenting), and as promoting "irrationality," *Oriental Trading and Transport Co.* v. *Gulf Oil Corp.*, 173 F.2d 108, 111 (2nd Cir. 1949), cert. den. 69 S. Ct. 1162.[14] Federal Judges have long chafed at having to

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Santa Maria to prove that her violation of Article 16 *could not possibly* have contributed to the collision with the San Jacinto (A. 36). Obviously this is an impossible burden of proof for petitioner to carry. The net result is that the Santa Maria is held liable equally with the San Jacinto *without any finding that her statutory violation contributed to the collision.*

[14] Other decisions critical of the rule include *In re Adams Petition*, 125 F. Supp. 110 (S.D. N.Y. 1954); affd. 237 F.2d 884 (2d Cir. 1956), cert. den. 352 U.S. 971, 77 S. Ct. 364 (1957); *Luckenbach S. S.* v. *United States*, 157 F.2d 250 (2d Cir. 1946); *The City of Chattanooga*, 79 F.2d 23 (2d Cir. 1935); and *St. Louis-San Francisco Ry.* v. *M/V D. Mark*, 243 F. Supp. 689 (S.D. Ala. 1965). Examples of academic criticism are Staring, "Contribution and Division of Damages in Admiralty and Maritime Cases," 45 Cal. L. Rev. 304 (1957); Allbritton, "Division of Damages in Admiralty —A Rising Tide of Confusion," 2 Journal of Maritime Law and Commerce, 322 (1971); Jackson, "The Archaic Rule of Dividing Damages in Marine Collisions," 19 Ala. L. Rev.

apply the rule to cases where there was a clear disparity of fault.[15] Yet they have applied it in the belief that only this Court possessed the power to alter the law.[16] Even this Court itself has acknowledged the rule's potential for injustice. In *The Umbria*, *supra*, a case which involved a factual situation much like the one here, the Umbria was proceeding full speed through a fog when it collided with the Iberia, which had improperly changed course. Even though both vessels were clearly at fault, this Court applied the *"City of New York* rule" to hold the Umbria *solely* at fault because of its "gross" misconduct. 17 S. Ct. at 612-613.[17]

Perhaps the most telling criticism of the equal division rule is the oft-noted fact that the United States is the only major sea-faring nation in the world to adhere to it. See *Staring*, "Contribution and Division of Damages in Admiralty and Maritime Cases," 45 Calif. L. Rev. 304, 340-341 (1957). The other nations—including England, from which we obtained

263 (1967); Mole & Wilson, "A Study of Comparative Negligence," 17 Corn. L. Q. 333 (1932); and Huger, "The Proportional Damage Rule in Collisions at Sea," 13 Corn. L. Q. 531 (1928).

[15] See, e.g., the excellent opinion of Judge Miner in *N. M. Paterson & Sons, Ltd.* v. *City of Chicago*, 209 F. Supp. 576 (N.D. Ill. 1962), revd. 324 F.2d 254 (7th Cir. 1963).

[16] See, e.g., *Ahlgren* v. *Red Star Towing & Transp. Co.*, 214 F.2d 618 (2d Cir. 1954).

[17] Although the *City of New York* rule was fashioned to avoid the unfairness of dividing damages where there is a great disparity of fault, the rule is itself unfair because it arbitrarily absolves one vessel from fault and subjects the other to liability out of proportion to its fault. See Staring, *supra*, note 14 at 341 n. 242.

the rule—have adopted the 1910 Brussels Convention which allocates fault proportionately in cases where it is possible to do so.[18] Any assertions that a comparative fault rule would be unworkable are refuted by the apparently satisfactory operation of the rule in these countries, see *In Re Adams Petition*, *supra*, 125 F. Supp. at 114, not to mention our own experience with state and federal comparative fault statutes—including maritime statutes.[19] By clinging to a legal dinosaur which has been repudiated by virtually all civilized nations our admiralty system forfeits the uniformity of maritime doctrine with other countries which is so essential to international commerce.

Some of the most creative law-making of this

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[18] A translation of relevant parts reads as follows:

"Art. 2. If the collision is accidental, if it is caused by force majeure, or if the causes of the collision are in doubt, the damages shall be borne by those who have suffered them.

". . .

"Art. 4. If two or more vessels are in fault, the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally.

"The damages caused either to the vessels, or to their cargoes, or to the effects or other property of the crews, passengers, or other persons on board, shall be borne by the vessels in fault in the above proportion without joint and several liability toward third parties. . . ." 6 Benedict on Admiralty (7th Ed. Rev.) at 39.

[19] E.g., Federal Employers Liability Act, 45 U.S.C.A. § 51-59; Merchant Marine (Jones) Act, 46 U.S.C.A. § 688; Death on the High Seas Act, 46 U.S.C.A. § 766. For a listing of various state railway acts, labor acts, and comparative negligence statutes, see Prosser, Law of Torts (4th Ed.) 435-438.

Court has taken place in the field of admiralty. *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, 339 U.S. 684, 690, 70 S. Ct. 861, 865, 94 L. Ed. 1206 (1950). For example, this Court has rejected the equal division rule where personal injury is involved. *The Max Morris*, 137 U.S. 1 (1890);[20] see also *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953). Recently, this Court created a remedy for wrongful death arising from unseaworthiness in state territorial waters. *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772 (1970). These decisions reflect the doctrine that damages in admiralty are given or withheld upon enlarged principles of justice and equity and are within the discretion of the court. *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827). And inasmuch as we are asking this Court to change a rule of damages and not one which regulates conduct directly, there is no problem of upsetting the justifiable expectations of parties who would be affected by such a decision.

Of utmost significance, these previous decisions by the Court were designed to make admiralty law more just. Yet one fundamental injustice remains to be corrected. In the words of a distinguished admiralty practitioner,

> "The present practice is a discredit to admiralty, which prides itself on its enlightened jus-

[20] This decision was subsequently implemented by Congress as the Merchant Marine (Jones) Act, 46 U.S.C.A. § 688.

tice, flexibility, and equity and has formerly pointed out the path of progress to common law jurisdictions that today, in this vital matter, have overtaken and passed it. This is not the result of a lack of desire on the part of the admiralty judges but of the failure of the admiralty bench and bar to consult their history and to appreciate that, if they desire justice, they have only to do it.[21]

Respectfully submitted,

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[21] Staring, *supra*, note 14 at 344.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNION OIL COMPANY OF CALIFORNIA, a corporation, *Plaintiff,* v. The Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III, their engines, boilers, tackle, apparel and furniture; and STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation, *Defendants,* STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation, *Cross-Plaintiffs,* v. UNION OIL COMPANY OF CALIFORNIA, a corporation, and the Tanker SS SANTA MARIA, *Cross-Defendants.*	Civil No. 68-1 OPINION

KILKENNY, JUDGE:

This is an admiralty case involving the collision of the SS SANTA MARIA, bareboat chartered by plaintiff, with the Barge OLIVER J. OLSON III in tow of the Tugboat SAN JACINTO on the Columbia River in the area between Waterford light and Cooper Point, although the parties are in dispute as to which side

of the channel. Plaintiff seeks to recover its damages resulting from the collision and defendants, owners of the Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III, have cross-complained to recover their damages resulting from the collision.

The following facts have been agreed upon by the parties:

The Union Oil Company of California is a California corporation and was the bareboat charterer of the SS SANTA MARIA, a tanker of American registry.

Defendant Star & Crescent Towboat Company is a California corporation and is the owner and operator of the Tugboat SAN JACINTO and defendant Oliver J. Olson Company is a California corporation and is the owner of the Barge OLIVER J. OLSON III.

On or about December 24, 1967, at approximately 2030 hours, the SS SANTA MARIA, piloted by a Columbia River pilot, was proceeding upstream in the Columbia River (a narrow channel) in the area between Waterford light and Cooper Point and the Tug SAN JACINTO, with the Barge OLIVER J. OLSON III towed astern on a tow line was proceeding downstream in the same general area when the bow of the SS SANTA MARIA was in collision with the starboard side of the Barge OLIVER J. OLSON III causing damage to both the bow of the SS SANTA MARIA and the starboard side of the Barge OLIVER J. OLSON III.

Involved in this case are clear cut issues of fact. Commonsense and the overwhelming weight of the evidence supports the plaintiff's contentions and I have no difficulty in finding:

(1) At all times mentioned herein, the SS SANTA MARIA was on its own side of the Columbia River Channel.

(2) The collision of the SS SANTA MARIA with the Barge OLIVER J. OLSON III was solely the fault of the Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III and those in charge of their navigation. Prior to the collision, the SS SANTA MARIA was proceeding upstream on her own side of the Columbia River Channel and downstream of the collision point, she made both a visual and a radar sighting of the Tug SAN JACINTO and its tow which then appeared to be on their own side of the Channel. The SS SANTA MARIA observed patchy fog conditions ahead and proceeded at half speed blowing her fog signal. Prior to the collision the SS SANTA MARIA lost visual contact with the tug though she herself was out of the fog. When the SS SANTA MARIA was approaching abeam of Light No. 70 and on the edge of the fog bank, she sighted the Tug SAN JACINTO headed across her bow. She immediately went full astern and blew both the danger signal and the astern signal. The Tug SAN JACINTO cleared her bow but the Barge OLIVER J. OLSON III struck her port bow and the force of the impact swung the bow to the starboard and it grounded on the Oregon shore on a heading of 090.

(3) The SAN JACINTO and the OLIVER J. OLSON III and those in charge of their navigation were at fault and negligent, proximately causing the grounding and damage, in the following particulars:

(a) In navigating the tug and barge at a speed which was unreasonable for the river and weather conditions of fog and mist then and there existing.

(b) In failing to maintain a sufficient lookout, both visually and by radar, in order to ascertain the presence and position and course of the SS SANTA MARIA.

(c) In acting hastily and without sufficient cause in pulling the tow across the channel when there was adequate clearance for the tug and barge to pass port to port.

(d) In failing to ascertain the risk of collision between the vessels and to sound a danger signal.

(e) In failing to sound fog signals when approaching and while passing through a fog bank.

(f) In failing to reduce speed, stop or reverse or otherwise take any evasive action to avoid crossing the bow of the SS SANTA MARIA.

(g) In turning directly across the channel into the path of the SS SANTA MARIA and thereby navigating on the wrong side of the channel.

(h) In failing to keep the tow under control and in allowing it to veer across the channel in the path of the SS SANTA MARIA and strike the bow of the SS SANTA MARIA.

(4) The faults and negligence of the SAN JACINTO and the Barge OLIVER J. OLSON III were major and fully account for the collision with the SS SANTA MARIA.

(5) Additionally, the collision was proximately caused by the sole fault and negligence of the Tug SAN JACINTO and the Barge OLIVER J. OLSON III and those in charge of their navigation in that they were in violation of the following Inland Rules, by which violation they were presumptably at fault:

(a) Inland Rule, Article 18, Rule III, 33 U.S. Code § 203, in failing to give a danger signal.

(b) Inland Rule, Article 15(2)(e), 33 U.S. Code § 191 in failing to sound any or adequate fog signals while proceeding towards, into and through a fog bank.

(c) Inland Rule, Article 16, 33 U.S. Code § 192 in proceeding at an unreasonable speed for the existing circumstances and conditions of fog and mist.

(d) Inland Rule, Article 29, 33 U.S. Code § 221, in failing to keep and maintain a proper lookout both visually and on radar to ascertain the true course of the SS SANTA MARIA.

I find that as a result of the aforesaid acts of fault and negligence on the part of the defendants, the SS SANTA MARIA sustained substantial damage to her hull, was laid up and Union Oil Company of California sustained damages.

Defendants and cross-plaintiffs have failed to es-

tablish fault on the part of the SS SANTA MARIA, and those in charge of her navigation, in any one or more of the particulars charged in their contentions and have failed to establish that any one or more of such alleged acts proximately contributed to the collision and resulting damage.

There is no doubt in my mind but that the SS SANTA MARIA "ascertained" the position of the Tug SAN JACINTO prior to and at the time of the Tug SAN JACINTO's fog signals. Consequently, the SS SANTA MARIA was justified in proceeding without stopping her engines. This "ascertainment" may be made by radar and is an adequate justification for failure to comply with the technical requirements that the engine be stopped. For that matter, it probably would be a lack of good judgment on the part of those in charge of the SS SANTA MARIA to stop their engines and lose their steerage way in this very narrow channel. *United States* v. *The Motor Ship HOYANGER*, 265 F. Supp. 730 (W.D. Wash. N.D. 1967); *Universal Ins. Co.* v. *THE COAST BANKER*, 129 F.2d 395 (9th Cir. 1942). The decision in *China Union Lines, Ltd.* v. *A. O. Andersen & Co.*, 364 F.2d 769 (5th Cir. 1966), is very persuasive on my decision on the facts in this case. Here, those in charge of the navigation of the SS SANTA MARIA had no reason to believe that the defendants would cut across the bow of their ship.

It is my view that any possible violation of Article 16 of the Inland Rules by the SS SANTA MARIA, or

those in charge of her navigation, were technical in nature and were not a contributing cause of the collision. The law on this subject is clear. *White Stack Towing Corp.* v. *Bethlehem Steel Co.*, 279 F.2d 419 (4th Cir. 1960); *Universal Ins. Co.* v. *THE COAST BANKER, supra; China Union Lines, Ltd.* v. *A. O. Andersen & Co., supra.* Defendants cannot shrould themselves with the rule of *in extremis.* They placed themselves in their dangerous position by failing to keep a proper lookout and other negligent acts as aforesaid. *THE JAMES A. LAWRENCE*, 117 F. 228 (2d Cir. 1902); *ATLAS MARU-ELENE*, 1961 A.M. C. 242 (D.C. Md. 1961).

The foregoing shall constitute my findings and conclusions on the issues of liability. I suggest that counsel for the respective parties arrange a conference in connection with plaintiff's damages. If there is no agreement, I shall fix a time for hearing on the issue of damages.

DATED this 3rd day of July, 1969.

John F. Kilkenny
District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNION OIL COMPANY OF CALIFORNIA, a corporation,
Plaintiff-Appellee,

v.

The Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III, their engines, boilers, tackle, apparel and furniture; and STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation,
Defendants-Appellants,

STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation,
Cross-Plaintiffs-Appellants,

v.

UNION OIL COMPANY OF CALIFORNIA, a corporation, and the Tanker SS SANTA MARIA,
Cross-Defendants-Appellees.

No. 25,775

[December 2, 1971]

Appeal from the United States District for the District of Oregon

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Before: CHAMBERS and WRIGHT, Circuit Judges, and McNICHOLS, District Judge.*

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* Honorable Ray McNichols, United States District Judge, District of Idaho, sitting by designation.

WRIGHT, Circuit Judge:

The appeal in this admiralty case requires us to consider the continuing vitality of the half-distance rule as the appropriate measure of the statutory command to go at moderate speed in fog. 33 U.S.C. § 192.

On Christmas eve 1967 a Union Oil Company tanker, the Santa Maria, collided with a lumber barge towed by the tugboat San Jacinto. The vessels were moving in darkness (8:32 p.m.) through most and fog in the narrow channel of the Columbia River between Waterford Light and Cooper Point, ten miles downstream from Longview, Washington. Both vessels sustained damage, and their owners brought libels and cross-libels in admiralty. The district court held the tug and barge solely at fault and exonerated the Santa Maria. We reverse, since we have concluded that the fault of both vessels contributed to the collision.

The Santa Maria, fully loaded with 17,000 tons of petroleum products, proceeded upstream toward Portland on the Oregon side of the channel. As the tanker passed Waterford Light those aboard could sight her course ahead for one and a half to two miles through haze and slight drizzle. A thick bank of fog obscured a stretch of water upstream near the Washington shoreline, to the port side of the Santa Maria's planned course. The vessel moved upstream at half speed, seven to eight knots, while nearing the fog bank.

The San Jacinto and its barge proceeded down-

stream through the low fog hugging the Washington bank, as a passing freighter informed the Santa Maria of the tug's approach. The tanker's pilot first sighted the tug, both visually and by radar, when the San Jacinto was near Cooper point, on the extreme Washington side of the channel. At that time the vessels were more than a mile apart. The tug then disappeared into the fog, breaking visual contact. The Santa Maria's pilot did not follow the San Jacinto's progress by radar, assuming apparently she would continue on her course along the Washington shore.

Meanwhile, those aboard the tug were unaware of the Santa Maria's approach. The San Jacinto's inexperienced crew attempted to feel their way through the fog by watching closely the contours of the adjacent shore, peering through the haze at the Washington bank and playing their radar on it. The district court found the tug at fault for neglecting to keep a proper lookout, failing to sound fog signals, and navigating too rapidly in the thick mist.

The tug crew suddenly glimpsed the range lights of a large ship looming through the fog less than a thousand feet ahead.[1] the lights were off the tug's starboard bow, or so the captain thought leading him to believe the tanker had veered to the wrong side of the channel. Fearing imminent collision, the tug captain executed a sharp U-turn to his left and attempted to run upstream away from the tanker. The tugboat successfully negotiated the turn, but the heavy lumber

[1] Witnesses estimated the distance at 150 to 300 yards.

barge behind it swung slowly around on its 250-foot line and sideslipped across the channel, striking the Santa Maria's port bow.

The tanker's watch had just resighted the San Jacincto when the tug began its erratic turn. The Santa Maria reacted quickly, putting its engines full astern and blowing danger signals. The barge smashed into the tanker's bow one minute later. Estimates of the Santa Maria's speed at the moment of impact range from three to seven knots.[2]

Evidence at the trial showed the tugboat had become disoriented in the fog and that the Santa Maria had remained well on the Oregon side of the channel. The district court found the tug captain had acted hastily and without sufficient cause in making the sudden turn that pulled the barge into the Santa Maria's path. Had the tug continued downstream the vessels would have passed safely port to port.

Appellants concede the tug's negligence, but seek a ruling of mutual fault. They contend that the tanker's speed while approaching the lateral bank of fog violated long-established rules governing operation under conditions of reduced visibility.

I.

Article 16 of the Inland Rules, 33 U.S.C. § 192, reads in part:

> Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having

[2] The pilot thought the speed at impact was six to seven knots. The third mate guessed it was three to four knots.

careful regard to the existing circumstances and conditions.

Although the statute does not define moderate speed, a well-recognized judicial gloss commands that "a vessel shall not proceed in a fog at a speed at which she cannot be stopped dead in the water in one-half the visibility before her." *The Silver Palm*, 94 F.2d 754, 757 (9th Cir. 1937). This half-distance rule has long had the force of law in this Circuit.[3]

The Santa Maria's speed was immoderate as measured by the half-distance rule. The trial court found that the tanker steamed ahead at half speed while approaching the edge of the fog bank. The chief mate testified that at half speed the ship would travel at seven to eight knots.

No more than 900 feet separated the vessels when the Santa Maria first saw the tug emerging from the fog. Although the Union Oil Company presented no evidence about her stopping capability, we think it fair to assume that a fully loaded tanker doing seven to eight knots could not conceivably come to a stop in 450 feet. The Santa Maria was still moving upstream at a speed between three and seven knots when the barge struck her bow. And since the tug had turned back upstream and the barge was swinging across

[3] *See, e.g.*, Universal Insurance Co. v. The Coast Banker, 129 F.2d 395 (9th Cir. 1942); The Silver Palm, 94 F.2d 754 (9th Cir. 1937); The Ernest H. Meyer, 84 F.2d 496 (9th Cir. 1936); United States v. Motor Ship Hoyanger, 265 F. Supp. 730 (W.D. Wash. 1967); Weyerhaeuser Steamship Co. v. United States, 174 F. Supp. 663 (N.D. Cal. 1959).

the channel sideways, the Santa Maria before impact had probably covered well over half the distance that initially separated the two vessels.

Appellees argue that the Santa Maria's speed would have allowed it to stop well within the visibility ahead on her own course, which was one and a half to two miles. This observation misses the mark. The relevant distance was no more than 900 feet, the maximum distance separating the vessel when the tug emerged from the fog.

A vessel navigating near a fog bank owes the duty of one immersed in fog. The speed and visibility calculations must be performed:

> ". . . with reference to the distance within which she could be brought to a stop in the water, before *any* course of *any* vessel emerging from the fog on either side would cross her projected course along the fog bank at its nearest point." *The Silver Palm*, 94 F.2d 754, 767 (9th Cir. 1937) (emphasis in original).

II.

Appellees contend that the Santa Maria's speed was not excessive because she had the San Jacinto in view or on radar at all times. The facts do not support this assertion. The pilot's testimony showed he had not followed the tug's progress on his radar screen, although he did make a radar sighting when the tug was over a mile upstream. The district court found,

> "Prior to the collision the SS SANTA MARIA lost visual contact with the tug though she herself was out of the fog. When the SS SANTA

MARIA was approaching abeam of Light No. 70 and on the edge of the fog bank, she sighted the Tug SAN JACINTO headed across her bow." 304 F. Supp. 519, 521 (D. Ore. 1969).

Ignoring this factual inaccuracy for the moment, we read appellees' argument to assert that a vessel operating with radar should be free from the strictures of the half-distance rule. The rule was developed in an earlier day, when speeding through fog was sheer folly, and pilots can now use electronic aids when visibility is limited. But knowledge of another vessel's presence does not solve all problems. Marine collisions continue to occur; at times the images on radar screens lull pilots into a false sence of security and encourage disaster.

If both vessels passing in fog correctly read and interpret their electronic equipment, there is little danger of collision. We must recognize, however, that inevitably men will make mistakes and mechanical aids will fail. Numerous collisions have happened despite radar sightings.[4]

Observance of the rule serves now as an extra safety precaution to avoid collision should a ship's

[4] *See, e.g.*, O/Y Finlayson-Forssa v. Pan Atlantic Steamship Corp., 259 F.2d 11 (5th Cir. 1958); Norscott Shipping Co. v. Steamship President Harrison, 308 F. Supp. 1100 (E.D. Pa. 1970); Holland-America Line v. Motor Vessel Johs. Stove, 286 F. Supp. 69 (S.D.N.Y. 1968); United States v. Motor Ship Hoyanger, 265 F. Supp. 730 (W.D. Wash. 1967); Skibs A/S Siljestad v. Steamship Mathew Luckenbach, 215 F. Supp. 667 (S.D.N.Y. 1963); Weyerhaeuser Steamship Co. v. United States, 174 F. Supp. 663 (N.D. Cal. 1959). All of these decisions invoke the half-distance rule.

radar malfunction or be misread. That cushion of safety can be vital. We do not think that use of radar removes the need for observance of the half-distance rule.

Even if one knows an oncoming vessel's location, one cannot always be sure the reverse is true. On such inland waters as the Columbia River, it cannot be assumed that an approaching craft has radar equipment and, even if it does, it may have no experienced radar operator.

Safety in fog on the open seas or inland waters requires two-way observation. There is danger of collision whenever a vessel cannot ascertain the position of another in the vicinity. The half-distance rule demands "defensive driving" and enables one master to escape the consequences of another's negligence or mistake.

III.

Appellees next argue that speed in violation of the rule may be justified by a need to maintain steerageway in a narrow channel. It is said that a large, heavily loaded ship may have difficulty steering when traveling below a given speed, say five knots, under adverse wind and tide conditions. But we have no evidence that the Santa Maria could not be safely navigated at less than seven to eight knots.[5]

[5] To the contrary, the pilot testified, "You can't slow a loaded ship, any ship, tanker or otherwise, from a full ahead to a slow bell without losing your steering. You have to reduce it slowly. But after you once get the speed off, they handle very good."

Even assuming such a handicap, we do not think the rule should be disregarded by vessels whose bulk necessitates immoderate speed, for a ship should not be underway if she cannot go at a safe speed. The steerageway excuse has been rejected by nearly every court to consider it. *See, e.g., Anglo-Saxon Petroleum Co.* v. *United States*, 224 F.2d 86 (2d Cir. 1955); *Holland-America Line* v. *M/V Johs. Stove*, 286 F. Supp. 69 (S.D.N.Y. 1968); *United States* v. *Motor Ship Hoyanger*, 265 F. Supp. 730 (W.D. Wash. 1967).

IV.

Appellees recognize these authorities, but urge us to abandon them and follow the path taken by a recent Fifth Circuit decision, *Hess Shipping Co.* v. *SS Charles Lykes*, 417 F.2d 346 (5th Cir. 1969).[6] *Hess Shipping* rejected the traditional half-distance rule. It declared instead that moderate speed is relative and must vary with the circumstances of each case. Applying this flexible standard, the court held that six knots through dense fog was moderate speed. It reached this startling conclusion by accepting the steerageway justification: "[A]ny reduction in speed would have seriously impaired the pilot's ability to control the vessel . . ." 417 F.2d at 350. The holding in *Hess Shipping* appears to mean that any ship too bulky to navigate safely in fog may exercise less caution.

A dissenting judge characterized the *Hess Ship-*

[6] On rehearing en banc, the Fifth Circuit split seven to seven, so this decision was affirmed by operation of law. 424 F.2d 633 (5th Cir. 1969).

ping interpretation of Inland Rule 16 thus:

> "The Court treats it as just a floating intersectional collision in which the fact finder can look back and see what prudent people would have done." 417 F.2d at 351.

This standard would allow pilots to make individual judgments about what speed is reasonable under the prevailing conditions. The half-distance rule takes that decision from their hands by imposing a formula to fit all circumstances. We are persuaded that the certainty supplied by the half-distance rule is preferable to the *ad hoc* judgment of a pilot navigating through fog.

Substituting the pilot's on-the-spot decision places too much reliance on individual competence and significantly expands the potential for pilot error.

> "Fog rules take into account the uncertainties as this enigma of nature shuts out sound and sight and frequently understanding." *O/Y Finlayson-Forssa* v. *Pan Atlantic Steamship Corp.*, 259 F.2d 11, 22 (5th Cir. 1958).

Selecting a speed in circumstances of poor visibility necessarily requires a master to balance the risk of accident against commercial pressures for a fast voyage. The half-distance rule comes down hard on the side of safety. If we take away the deterrent of the rule marine commerce may move more swiftly, but with more accidents. Even with the rule in force, the exigencies of commerce sometimes push pilots to excessive speeds.

> "The fact that the rule is more honored in the breach than in the observance merely means that people are usually willing to take chances rather than submit to the galling necessity of poking about in a fog; and, although the usual measure of the care demanded is that commonly used in the calling, that is not the inevitable standard. Common prudence is not always adequate prudence; the courts may and at times do condemn practices that are current in the business." *Anglo-Saxon Petroleum Co.* v. *United States*, 222 F.2d 75 (2d Cir. 1955).

This passage by Judge Learned Hand indicates that even so strong and definite a standard as the half-distance rule has questionable deterrent value. Any lower standard would create a much higher risk of marine tragedy.

The Santa Maria violated the statutory command of Inland Rule 16 and the violation is not excused because the fault of the San Jacinto was more flagrant and shocking. The Santa Maria's only chance to escape liability is to prove that her statutory fault could not possibly have contributed to the collision. *The Pennsylvania*, 86 U.S. 125 (1874); *The Silver Palm*, 94 F.2d 754 (9th Cir. 1938); *O/Y Finlayson-Forssa* v. *Pan Atlantic Steamship Corp.*, 259 F.2d 11 (5th Cir. 1958). On this record she cannot meet that heavy burden.

Her statutory fault renders the Santa Maria liable for half damages. The judgment of the district court should be modified to hold both vessels at fault, and the damages divided.

Remanded to the district court to ascertain appellants' damages.

APPENDIX C

28 U.S.C. § 1254: *Courts of appeals; certiorari; appeal; certified questions*

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1333: *Admiralty, maritime and prize cases*

The district courts shall have original jurisprudence, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime juris-

diction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

28 U.S.C. § 2101: *Supreme Court; time for appeal or certiorari; docketing; stay*

* * * * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

33 U.S.C. § 192: *Speed in fog, etc. (Art. 16)*

Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM 1971

No. 71-900

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Petitioner,

v.

The Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III, their engines, boilers, tackle, apparel and furniture; and STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents do not accept petitioner's statement of the questions presented for review, and submit they are more accurately stated as follows:

1. Was it appropriate for the Court of Appeals, in determining whether the speed of a vessel was in excess of the "moderate speed" required by Article 16(a) of the Inland Rules, 33 U.S.C. § 192, to apply the "Rule of Sight" to the SANTA MARIA, a large tanker proceeding up a narrow river channel toward a fog bank, with knowledge that a tug and tow were coming down river in the fog, but unable to see the position or change of course of the tug and tow because of the fog, at a speed of 7-8 knots per hour, at which speed the tanker could not be stopped before reaching the point where she first saw the tug emerge from the fog, and was still going 3 to 7 knots at the moment of collision?

2. Should the rule that in mutual fault collision cases the damages are divided equally, which has been the well-established law of the United States for over a hundred years, be changed by judicial decision?

STATEMENT OF THE CASE

Petitioner's biased "statement of the case" should not be accepted.

A fair statement of the case is set forth in the first three pages of the Court of Appeals opinion, Petition, Appendix B, at pp. 27, 28, 29.

The essential facts are that SANTA MARIA was a large tanker, 550 feet long, 11,291 gross tons, fully loaded with 17,000 tons of petroleum products. She was proceeding upstream, in darkness at night, in a narrow channel of the Columbia River. She maintained a speed of 7 to 8 knots[1] while approaching a fog bank that concealed the downcoming tug and barge.[2] The SANTA MARIA knew of the presence of the tug and barge, but could not see their position or change of course because of the fog.

The tug crew sighted the mast lights of the SANTA MARIA looming through the fog, at less than 1,000 feet distance. Fearing imminent collision, the tug executed a sharp U-turn to its left and tried to run away from the tanker.[3] The tug actually completed the U-turn, and was making headway *up* river, going in the same direction as the SANTA MARIA,

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[1] One knot (nautical mile) = 6,000 ft.; 1 knot speed = 100 ft. per minute; 8 knot speed = 800 ft. per minute.

[2] The tug was 110 feet long, twin screw, 1500 HP; the barge was 275 feet long, on a 250 foot towline. They were proceeding at 7 knots, and slowed to 3½ knots on first hearing the SANTA MARIA's fog signal. (Transcript of testimony pp. 155, 171, 219).

[3] Transcript of testimony, pp. 161, 187, Exhibit 25.

at the time of the collision. The barge swung around behind the tug on its tow line, and was headed diagonally up river when struck by SANTA MARIA.

The SANTA MARIA sighted the tug emerging from the fog bank at about 900 feet distance, at which moment the tug was in the middle of its U-turn and proceeding across and at right angles to the course of SANTA MARIA.[4] SANTA MARIA immediately went full astern, but in one minute collided with the barge. (See diagram, page 5 for relative positions).[5] At the moment of collision, SANTA MARIA was still going 6-7 knots by testimony of her pilot.[6]

REASONS FOR DENYING THE WRIT

I

THE RULE OF SIGHT

None of the reasons set forth in Rule 19 as the criteria for granting certiorari exist in this case.

This case, like all collision cases, must be determined on its particular facts. SANTA MARIA's speed was clearly immoderate under Article 16(a), and the Court of Appeals properly so held.

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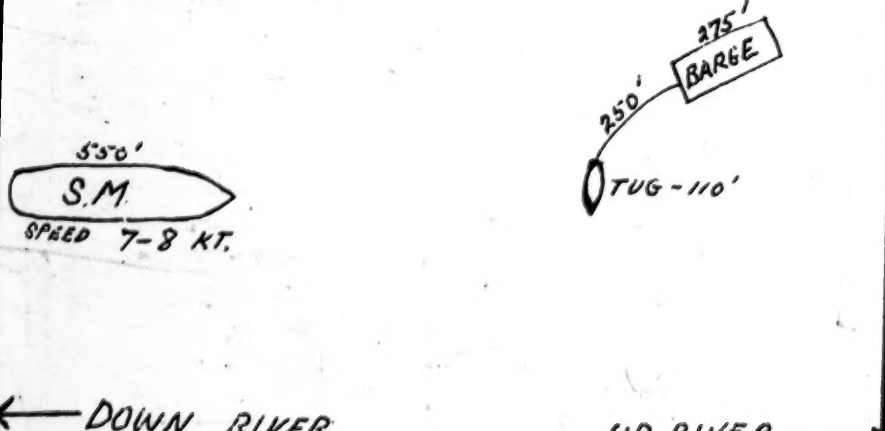
[4] Petition, Appendix A, p. 21, Tr. of testimony, p. 80.

[5] Based on Ex. 25, Tr. of Testimony, pp. 80, 111, 117, 118, 188, 192, 224.

[6] Her mate guessed she was going 3-4 knots at time of impact. Even the force of collision did not stop her; her momentum carried her onward and she was only stopped by running "fast aground" where she remained 11 hours until pulled off by tug boats (Ex. 3, Tr. 81-82, 84).

A. WHEN SANTA MARIA FIRST SAW TUG EMERGE FROM FOG, NOT OVER 900 FT. DISTANT (PET. APPX. B, p 30-31). TUG HEADED AT RIGHT ANGLE ACROSS BOW OF SANTA MARIA (PET. APPX A. p 21, TR. TESTIMONY p 80).



B. AT MOMENT OF IMPACT, TUG MAKING HEADWAY UPSTREAM. (EX. 25) SANTA MARI STILL GOING 6-7 KNOTS BY TESTIMONY OF HER PILOT.

The Court of Appeals held the "Rule of Sight," often called the "half-distance rule," applicable to the facts of this case. This rule, which originated in early decisions of this Court, and has been variously stated by the courts, in substance is:—to comply with the "moderate speed" requirement of Article 16(a), a vessel proceeding in or near a fog bank must reduce to such speed as will enable her, by immediately reversing her engines upon first sighting another vessel, to come to a stop before colliding with the other vessel. Thus if each vessel obeys the rule, each will be able to stop upon or before reaching the point of impact, and collision or serious damage will be avoided.

No Conflict

Petitioner's vision of a conflict with decisions of this Court, or decisions of other courts of appeal, is a mirage. It vanishes on close examination of the cases.

The "rule of sight" was first stated by this Court in *The Nacoochee*, 137 U.S. 330, 34 L. Ed. 687 (1890). The steamer NACOOCHEE was held in fault for going at half speed, 6-7 knots, in fog on the open ocean where she knew she might encounter the other vessel. This Court said:

> "She was bound, therefore, . . . to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog." 137 U.S. at p. 339, 34 L. Ed. at p. 690.

The rule was next stated in substantially the same language in the opinion by Mr. Justice Brown, in *The Umbria*, 166 U.S. 404, 41 L. Ed. 1053 (1897).[7]

Then in *The Chattahoochee*, 173 U.S. 540, 43 L. Ed. 801 (1899), holding a sailing schooner at fault for going 7 miles per hour in fog, the opinion by Justice Brown states:

> "It has been said by this Court, in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law." 173 U.S. at p. 548, 43 L. Ed. at p. 805.

It is clear that the rule laid down by this Court in these early cases requires each vessel to proceed only at such speed that she can be stopped within *her share* of the distance of visibility. The requirement is that they be able to stop "*in time to avoid a collision.*" Thus two approaching vessels, suddenly coming in sight of each other in the fog, must each be able to stop within one-half of the distance at which they first become visible, in order to avoid collision.

This was well stated by the late John W. Griffin

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[7] "The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law." *The Umbria*, 166 U.S. 404 at p. 417, 41 L. Ed. 1061.

in his leading American treatise on collision:

> "In the *Nacoochee*, and in *The Umbria*, . . . the Supreme Court said, not that the vessel need be able merely to stop within the visible distance, but that she must stop *'before she should collide with a vessel which she should see through the fog,'* 'provided that such approaching vessel is herself going at the moderate speed required by law.'
>
> . . . . .
>
> "The Supreme Court meant that each vessel must be able to stop before she reached the meeting point,—in other words, to restrict each vessel to her share of the visible distance. No other rule would accomplish the result." *Griffin, The American Law of Collision*, 1949, at pp. 294, 295.

The decisions of the Ninth Circuit in the present and past cases are clearly in accord with these decisions of the Supreme Court.

The same rule is followed generally in the maritime circuits. For example:

Second Circuit:

Anglo Saxon Petroleum Co. v. *United States*, 222 F.2d 75, rehearing 224 F.2d 86 (2 Cir. 1955).
The William H. Taylor, 278 F. 717 (2 Cir. 1922).
The Manchioneal, 243 F. 801 (2 Cir. 1917).

In fact, the rule is so well established that Learned Hand said "everybody knows" it:

> "Although Article 16, 33 U.S.C.A. § 192, only requires a vessel in a fog to 'go at a moderate speed,' *as everybody knows*, the courts have imposed a gloss upon this that 'moderate speed is that at which, if the other vessel also does her

duty, the vessel will be able to stop her way before they collide.'" (emphasis supplied) *Anglo Saxon Petroleum Co.* v. *United States*, supra at p. 77.

Third Circuit:

The Bohemian Club, 134 F.2d 1000, 1002-3 (1943).

Fourth Circuit:

City of Norfolk, 266 F. 641, cert. den. 253 U.S. 491, 64 L. Ed. 1028 (1920).

Fifth Circuit:

O/Y Finlayson-Forssa v. *Pan Atlantic S.S. Corp.*, 259 F.2d 11 (5 Cir. 1958), cert. den. 361 U.S. 882, 4 L. Ed. 2d 119 (1959).

In that case, Judge John R. Brown, an experienced admiralty practitioner and judge said:

"Without a doubt the circumstances called for the application of the traditional rule of sight by which the vessel must proceed at a rate of speed which will allow her to come to a stop within one-half limit of visibility. *The Tug Percheron*, 5 Cir., 246 F.2d 135, 1957 A.M.C. 1941; *The Nacoochee*, 137 U.S. 330, 339, 34 L. Ed. 687, 690; *The Umbria*, 166 U.S. 404, 417, 41 L. Ed. 1053, 1060; *Griffin on Collision*, pp. 288-296." 259 F.2d at p. 20.[8]

[8] The Court also said,
"... the Antinuous had to demonstrate that ... she could stop before she traversed one-half the distance she could see. *A. H. Bull SS Co.* v. *United States*, 2 Cir., 34 F.2d 614, 1929 A.M.C. 1175; *The Lillian Anne-Pennsylvania*, 2 Cir., 1934 A.M.C. 569, cert. den.; *Chesapeake & Dela-*

Ninth Circuit:

The Silver Palm, 94 F.2d 754 (9 Cir. 1938).
The Ernest H. Meyer, 84 F.2d 496 (9 Cir. 1936).
U. S. v. *Motorship Hoyanger*, 265 F. Supp. 730 (W.D. Wash. 1967).
Weyerhaeuser S.S. Co. v. *U. S.*, 174 F. Supp. 663 (N.D. Cal. 1959).

Petitioner's Authorities

Certainly it is true that this Court, in *The Umbria* and *The Chattahoochee*, and many of the decisions of the lower courts, state that "moderate speed" is a relative term dependent upon the circumstances. But at the same time, the determination of what is moderate cannot be left wholly to the discretion of the navigator. There must be some minimum standards. And therefore, quite consistent with the concept that "moderate speed" depends on the circumstances, this Court, and the lower courts, have pronounced the "Rule of Sight" as a minimum standard.

In its effort to show "conflict," petitioner relies primarily on the decision of the Fifth Circuit Court of Appeals in *Hess Shipping Corp.* v. *S.S. Charles Lykes*, 417 F.2d 346, on reh. en banc, 424 F.2d 633, cert. den. 400 U.S. 853, reh. den. 400 U.S. 931.

But *Hess Shipping* does not reject the Rule of

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ware Steamboat Company v. *The Tug Pennsylvania*, 293 U.S. 575, 55 S. Ct. 86, 79 L. Ed. 673, 1934 A.M.C. 1410; *The Goldshell-White Plains*, 2 Cir., 224 F.2d 86, 1955 A.M.C. 1438; *Marsden's Collisions at Sea*, 10th Ed. 1953, pp. 479-480." 259 F.2d at p. 21, cert. den. 361 U.S. 882, 4 L. Ed. 2d 119 (1959)

Sight; it only allowed an exception in the particular case where a speed greater than "Rule of Sight" speed was absolutely essential to keeping the vessel under control.

Prior to *Hess Shipping*, the Fifth Circuit adhered staunchly to the Rule of Sight. *O/Y Finlayson-Forssa* v. *Pan Atlantic Steamship Corp.*, 259 F.2d 11, 22 (1958), cert. den. 361 U.S. 882, 4 L. Ed. 2d 119 (1959). See the excerpts from that opinion set forth *ante*, p. 9. The Court in *Hess Shipping* recognizes the "Rule of Sight," and cites its prior opinion in *O/Y Finlayson-Forssa*, but allows the exception where any further reduction in speed would have increased the hazard of a more serious collision.[9]

Therefore, what *Hess Shipping* actually did was to qualify the Rule of Sight by allowing the vessel to maintain bare steerageway. Chief Judge John R. Brown dissented in most vigorous terms.[10] On the re-

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[9] The Hess opinion states:

"Whether a court recognizes the 'Bare Steerage Rule,' i.e., that 'speed should be reduced to the lowest point consistent with good steerage way' *Skibs A/S Siljestad* v. *Mathew Luckenbach*, 215 F. Supp. 667, 679 (S.D. N.Y. 1963), or the 'Rule of Sight,' i.e., 'the vessel must proceed at a rate of speed which will allow her to come to a stop within one-half limit of visibility.' *O/Y Finlayson-Forssa A/B* v. *Pan Atlantic S/S Corp.*, 259 F.2d 11, 20 (5 Cir. 1958), both of which are tempered by and subject to analysis under the existing circumstances, . . . The facts support and justify a conclusion that any reduction in speed would have seriously impaired the pilot's ability to control the vessel, which might have resulted in a more serious accident than that which occurred." 417 F.2d at pp. 349-350.

[10] In *The Pennsylvania*, 86 U.S. 125, 134, 22 L. Ed. 148, 151 (1874), where the steamship argued her 7 knot speed was necessary for steerageway, the Supreme Court rejected the

hearing en banc, the fourteen judges were evenly divided, seven to seven, and so the judgment was affirmed by operation of law. The case is one decided on unusual particular facts, and is the exception that proves the rule.

The holding in *Hess Shipping* is not in conflict with the present decision of the Ninth Circuit, for, as the opinion in the present case states, SANTA MARIA cannot qualify for the "Bare Steerage-way" exception allowed in *Hess Shipping:*

> "But we have no evidence that the SANTA MARIA could not be safely navigated at less than seven to eight knots."[11]

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excuse. See also Learned Hand's opinion on this point in *Anglo-Saxon Petroleum Co.* v. *United States,* 224 F.2d 86 (2 Cir. 1955); "Failure to comply with the moderate speed requirement in fog is not excused by the desire to maintain steerageway." *Afran Transport Co.* v. *The Bergechief,* 170 F. Supp. 893, 899 (S.D. N.Y. 1959); *Holland-America Line* v. *M/V Johs. Stove,* 286 F. Supp. 69 at 72 (S.D. N.Y. 1968)

[11] Opinion of Court of Appeals, Petition, Appendix B, p. 33.

To the contrary, Santa Maria's helmsman, with 22 years experience, testified his vessel 'steered good" (Ex. 26, p. 9), and steered just as well at slow speed as at half or full speed:

> "Q. Is it more difficult to hold an exact course when you are going at slow speed?
>
> A. I don't find it so, no. If you give it enough wheel, she will hold her course real good.
>
> . . . . .
>
> Q. Now, does it make any difference whether you are going full speed, half speed or slow speed and fully loaded?
>
> A. Not if you give it enough wheel it doesn't make any difference. . . ." (Dep. of oMrgan, Ex. 26, p. 17).

The pilot testiifed, 'You can't slow a loaded ship, any ship, tanker or otherwise, from a full ahead to aslow bell without losing your steering. You have to reduce it slowly. But after you once get the speed off, they handle very good." (Petition, Appendix B, p. 33).

The remaining cases cited by petitioner for "conflict" are from the Second and Third Circuits (Petition, p. 6). But none are in conflict with the present decision of the Ninth Circuit. To the contrary, all adhere to the "Rule of Sight" or an even stricter rule.

Polarus S.S. Co. v. *T/S Sandefjord*, 236 F.2d 270 (2 Cir. 1956) recognizes the rule of sight:

> "The purpose of the statute, spelled out in the 'sight rule,' is to require generally and not absolutely that a vessel proceed only at such speed that it can stop before striking another vessel which comes into the range of its vision." 236 F.2d at p. 272.

The POLARUSOIL was exonerated because it was "stopped in the water" at the time of collision.

The *Bayonne*, 213 F. 216 (2 Cir. 1914), states that under the rule of *The Umbria*, the vessel's speed is not moderate "if the vessel cannot avoid another vessel which is herself complying with the law, after discovering her." 213 F.2d at p. 217. In that case the

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It is also significant that SANTA MARIA's Log Book (Ex. 3) and Engine Bell Book (Ex. 4) establish that a few hours previously, but while being navigated by a *different pilot*, she *did* navigate at *slow* speed in the Columbia River near Astoria for 18 consecutive minutes (1735½ to 1753½).

SANTA MARIA also could, and should, have anchored if unable to proceed at a moderate speed. *The Pennsylvania* v. *Troop*, 86 U.S. 125, 134, 22 L. Ed. 148, 151; *Holland-America Line* v. *M/V Johs. Stove*, 286 F. Supp. 69, 72-73 (S.D. N.Y. 1968); *Norscott Shipping Co. Ltd.* v. *President Harrison*, 308 F. Supp. 1100, at 1106 (E.D. Pa. 1970). Her Log Book shows that she anchored repeatedly on the following day on occasions when she encountered fog while proceeding the rest of the way up the river to Portland (Ex. 25, pp. 12-13).

vessel was held at fault for a speed of 3½ miles an hour.

Villain & Fassio E Compagnia v. *The Tank Steamer E. W. Sinclair*, 207 F. Supp. 700 (S.D. N.Y. 1962), aff'd 313 F.2d 722, gives no support to the claim of conflict. The opinion states:

> "The rule is stated not only in terms of the range of visibility but also in terms of requiring the vessel to be able to stop before a collision occurs." 207 F. Supp. at 707.

Skibs A/S Siljestad v. *S/S Mathew Luckenbach*, 215 F. Supp. 667 (S.D. N.Y. 1963), aff'd 324 F.2d 563, suggests an even stricter rule. After stating "Some courts have applied the Rule of Sight, viz., to be able to stop within the vessel's share of the visibility," the opinion proceeds:

> "Perhaps, too, the decisional law in this circuit is even stricter than either the Bare Steerageway Rule or the Rule of Sight for in *Afran Transport Co.* v. *The Bergechief*, 274 F.2d 469, 473 (2 Cir. 1960), the *BERGECHIEF* was condemned for maintaining steerageway in dense fog in the absence of a current of substantial force." 215 F. Supp. at p. 679.[12]

In *Oil Transfer Corp.* v. *Westchester Ferry Corp.*, 173 F. Supp. 637 (S.D. N.Y. 1958), Judge Learned Hand applied an even stricter rule. In this case the ferry endeavored to justify her 7 knot speed by claiming that, with propellers at each end of the vessel,

[12] *The Mathew Luckenbach's* speed of 7 knots was held excessive.

she could stop in half the distance of visibility. Judge Hand recognized the general rule:

> "It is quite true that the generally accepted rule is that a vessel may travel in a fog at a speed that will allow her to stop within the distance of the existing visibility if she meets another vessel who can also stop within that distance. That would of course mean half the distance of the visibility if the meeting vessel was moving at the same speed, and the Ninth Circuit appears to have made this the test." 173 F. Supp. at p. 639.

But Judge Hand said even this rule might be too lenient, because some allowance should be made for the time it takes to put the engines full speed astern after sighting the opposing vessel. He held the ferry at fault for 7 knot speed.

Judge Hand's endorsement of the Rule of Sight is made even more clear by his "as everybody knows" statement (ante p. 8) in his subsequent opinion for the Second Circuit Court of Appeals, in *Anglo Saxon Petroleum Co.* v. *United States*, 222 F.2d 75.

And upon rehearing of that case he rejects the steerageway excuse, on authority of *The Pennsylvania*, 19 Wall. 125, 133, 134, 86 U.S. 125, 133, 134, 22 L. Ed. 148, and states:

> "Though we were to accept this as true (necessary to maintain steerageway) it would not be an excuse for exceeding 'moderate speed' as we defined it in our original opinion: *The command is imperative.*" (Emphasis supplied) 224 F.2d 86 (2 Cir. 1955).

The two cases cited from the Third Circuit, *The Bohemian Club*, 134 F.2d 1000 (3 Cir. 1942) and *C. F. Norscott Shipping Co.* v. *Steamship President Harrison*, 308 F. Sup. 1100 (E.D. Pa. 1970) are fully in accord with the general rule of sight and present no conflict.

Petitioner's Objections to the Rule of Sight

Petitioner's objections to the Rule of Sight (Petition pp. 9-12) are wholly unfounded.

It is stated that the rule fails to take account of particular circumstances such as position of the vessels, weather, size and maneuverability of the vessels, etc. But these are, of course, the very factors that enter into the ability of the vessel to stop within her share of the distance. If the visibility in the fog is half a mile, obviously a vessel can go much faster than if visibility is only a hundred yards. If a strong headwind could help stop a vessel, that again may be considered. A twin screw vessel able to stop more quickly by extra power astern on the engines may be permitted a speed greater than one not so equipped. A fully loaded vessel may have to proceed more slowly than the light vessel, due to the fact that her momentum will carry her further. All that the vessel must do to comply with the rule is to proceed at *such* speed, that she can be stopped in time to avoid collision after sighting the other vessel. And of course all these factors enter into her ability to stop at such distance.

The fact is that in the present case, SANTA MA-

RIA not only was unable to stop, even after traversing the entire distance (rather than half the distance);—she was still going at from 3 to 7 knots, and her forward momentum was not checked until she ran aground on beyond the point of collision. Her speed was clearly excessive under all the circumstances and can not even be justified by necessity to maintain steerageway (ante p. 12, footnote 11).

The objection based upon "uniformity" of course vanishes along with the mirage of "conflict."

As the opinion of the Ninth Circuit states, the Rule of Sight promotes safety. Judge Learned Hand's remarks are most appropriate:

> "The fact that the rule is more honored in the breach than in the observance merely means that people are usually willing to take chances rather than submit to the galling necessity of poking about in a fog; and, although the usual measure of the care demanded is that commonly used in the calling, that is not the inevitable standard. Common prudence is not always adequate prudence; the courts may and at times do condemn practices that are current in the business." *Anglo-Saxon Petroleum Co.* v. *United States*, 222 F.2d 75, 78 (2d Cir. 1955).

Relaxation of the Rule of Sight to the point urged by petitioner, leaving speed in fog entirely to the discretion of the navigator, with no judicial standards, would benefit only the lawyers who handle collision cases.

A final word as to Article 16 and the Rule of

Sight. The rule has been enforced as a judicial "gloss" of Article 16 for many years. Congress had "moderate speed" under consideration when adopting the Radar Annex to the Rules of the Road in 1963, 33 U.S.C.A. § 1094. It could have, but did not, make any relaxation in the Rule of Sight.[13]

II

EQUAL DIVISION OF DAMAGES

The Court of Appeals, in holding that SANTA MARIA's fault renders her liable for equal division of damages, followed the decisions of this Court and the established law.

What petitioner admittedly asks is that this Court assume a legislative role and change a rule which has been settled law in this country for more than 100 years.[14]

The rule that where both vessels are at fault the

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[13] To the contrary, the new Annex provides:
"Radar indications of one or more vessels in the vicinity may mean that 'moderate speed' should be slower than a mariner without radar might consider moderate in the circumstances." 33 U.S.C.A. § 1094(2).

[14] Petitioner's complaint (Petition p. 13) of the supposed inequity of the divided damages rule as applied to the facts of this case seems outside the scope of a Petition for Certiorari. The Court of Appeals simply said the fault of Santa Maria could not be excused because the fault of the tug was *more* flagrant and shocking, which implies that the fault of SANTA MARIA was *also* flagrant and shocking. (Pet. Appx. B, p. 36). Indeed, on the facts, SANTA MARIA's speed which resulted in her inability to stop, and still going at 3-7 knots after traversing the *entire* distance of visibility, clearly contributed to the collision and was a major statutory fault, substantially equal to the fault of the tug.

damages are divided equally (rather than in proportion to degree of fault) was first pronounced by this Court in *The Schooner Catharine* v. *Dickinson*, 58 U.S. (17 How.) 170, 15 L. Ed. 233 (1855). This was followed by a long line of cases which firmly established the rule:

> "Cases also arise where both vessels are in fault; and the repeated decisions of this court have established the rule, that in that contingency the damages shall be equally apportioned between the offending vessels as having been occasioned by the fault of both. *The Catharine* v. *Dickinson*, 17 How. 177, 15 L. Ed. 235; *The Sunnyside*, ante, 302 (91 U.S. 208, 23 L. Ed. 302); *The Continental*, 14 Wall. 355, 20 L. Ed. 802; *The Morning Light*, 2 Wall. 560, 18 L. Ed. 864; *The Pennsylvania*, [*U. Steamship Co.* v. *N. Y. & Va. Steamship Co.*], 24 How. 313, 16 L. Ed. 701." *Phoenix Ins. Co.* v. *The Atlas*, 93 U.S. 302, 319, 23 L. Ed. 863, 868 (1876).

The rule has been followed consistently by the lower courts in literally hundreds of cases. And this Court has consistently denied certiorari. See, for example, *In re Adams Petition* (Melrose-Sandcraft), 237 F.2d 884, 887 (2 Cir. 1956), cert. den. 352 U.S. 971, 1 L. Ed. 2d 325 (1957); *The A. C. Dodge*, 234 F.2d 374 (2 Cir. 1956), cert. den. 352 U.S. 928, 1 L. Ed. 2d 163 (1956); *National Bulk Carriers, Inc.* v. *United States*, 183 F.2d 405, 410 (2 Cir. 1950), cert. den. 340 U.S. 865, 95 L. Ed. 631 (1950).

In 1952, this Court referred to the rule as "established admiralty doctrine."

> "Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties. This maritime rule is of ancient origin and has been applied in many cases. . . ." *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 at p. 284, 96 L. Ed. 318 at p. 319.

It is true, as petitioner points out, that the rule of equal division of damages has been criticized by some judges of the lower courts, and by a few academic writers, and that the Brussel's Convention of 1910, which provides that damages be apportioned in accordance with the degree of fault of each vessel, has been adopted by many of the maritime nations of the world.[15]

However, the Brussel's Convention was submitted to the United States Senate in 1937, and failed to receive approval. In 1947 it was returned to the President without having been acted upon.[16]

In 1962 a bill (S. 2313) to provide for proportional fault in collision cases was before the Senate, and reached the floor sponsored by Senator Bartlett of Alaska. But in the face of objections by interested

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[15] England followed the rule of equal division of damages, see *Marsden's Collisions at Sea*, Sixth Ed. (1910) pp. 123, 124, until after its adherence to the Brussel's Convention.

[16] See Senate Report 1603, 87th Congress, 2nd Session; *Knauth, Benedict on Admiralty*, 7th Ed. Vol. 6, p. 38.

groups, it was "indefinitely postponed" by unanimous consent.[17]

The very fact that the Brussel's Convention has repeatedly failed to win Congressional approval indicates that the Congress has no desire to change the law as it has been settled in this country for over 100 years.

Moreover, there has been no recent clamor by steamship companies, marine insurance companies, or shipping interests, seeking to change the rule. This appears to indicate general satisfaction, or at least acceptance, of the settled law on the part of shipping and commercial interests, despite the criticisms that have come from a few academic writers.

Under these circumstances, what was said by this Court in *Halcyon Lines* seems to be quite appropriate:

> "We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await Congressional action. . . . A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made. The record before us is silent as to the wishes of employees, carriers, and shippers; it only shows that the *Halcyon Line* is in favor of such a change in order to relieve itself of a part of its burden in this particular lawsuit." *Halcyon Lines* v. *Haenn Ship*

[17] Congressional Record, 87th Congress, 2nd Session, Vol. 108, Part 16, page 21249.

Ceiling & Refitting Corp., 342 U.S. 282 at pp. 285-286, 96 L. Ed. 318 at pp. 320-321 (1952).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents

February 4, 1972

BRIEF FOR THE PETITIONER

In the Supreme Court of the United States

OCTOBER TERM 1971

No. 71-900

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Petitioner,

v.

The Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III, their engines, boilers, tackle, apparel and furniture; and STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been officially or unofficially reported; the full text of the opinion appears in the Appendix to the petition for writ of certiorari.

The opinion of the United States District Court

for the District of Oregon is reported at 304 F. Supp. 519 (D. Or. 1969).

JURISDICTION

The judgment of the court of appeals was entered December 2, 1971. The petition for writ of certiorari was filed on January 10, 1972, and was granted on February 28, 1972. The jurisdiction of this Court rests on 28 U.S.C. § 1254 and 28 U.S.C. § 2101(c).

STATUTE INVOLVED

Article 16 of the Navigation Rules for Harbors, Rivers, and Inland Waters Generally (Inland Rules), 30 Stat. 99, 33 U.S.C. § 192:

> "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> "A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

QUESTIONS PRESENTED FOR REVIEW

1. Does Article 16 of the Inland Rules, 33 U.S.C. § 192, which provides that "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed," permit a court of appeals to adopt

a rule that a vessel navigating near a fog bank must proceed at a speed which would enable her to be stopped in one-half the distance between her and a point along her projected course at which she might collide with any vessel emerging from the fog on any course?

2. Does the admiralty rule of equal division of damages apply to a collision in which one vessel has been flagrantly negligent while the other vessel has committed a minor statutory infraction which may not even have been a contributing cause of the collision?

STATEMENT OF THE CASE

This case involves a collision on the Columbia River between petitioner's tanker, the Santa Maria, and a barge towed by respondent's tug, the San Jacinto, after the tug made an abrupt U-turn in front of the tanker. The owners of the vessels sued one another by complaint and cross-complaint (R. 1), each claiming that the other was solely at fault. The district court absolved petitioner's tanker from blame and held respondent's tug and barge in violation of numerous rules of navigation (A. 21-23).[1] The court of appeals reversed, holding petitioner liable for half damages on the grounds that its tanker had violated Article 16 of the Inland Rules (the moderate speed in fog rule)

[1] The opinions rendered in the courts below were printed in the Appendix to the petition for writ of certiorari, and all references are to that Appendix.

and that petitioner was unable to prove that this statutory violation could not have contributed to the collision (A. 36).

The collision occurred in darkness at 8:32 p.m. on December 24, 1967. In the area of collision the Columbia River is approximately 1,500 feet wide; the ships' channel is 500 feet wide (R. 12). Petitioner's tanker, carrying 17,000 tons of petroleum products, was proceeding upstream on the Oregon side of the channel under the command of a licensed Columbia River pilot who had been sailing the Columbia since 1928 and had piloted over 2500 ships on the river (R. 63-4). The tanker was traveling at half speed, approximately 7 to 8 knots. Visibility along her course was one and one-half to two miles in haze and slight drizzle. A bank of fog lay upstream of the tanker along the Washington side of the river and to the left of the tanker's course (A. 27).

Respondent's tug was upstream of the tanker proceeding downstream close to the Washington bank. It was towing a barge loaded with lumber at the end of a 250 foot cable (A. 27-29). The tug was encountering intermittent fog and was attempting to feel its way downriver by following the contours of the Washington bank visually and on radar. The tug was unaware of the tanker's approach (A. 28). The crew of the tug was inexperienced; the captain was 29 years of age, had been captain only three months, was unlicensed and had navigated the Columbia River only four or five times (A. 28, R. 151, 166-7). When it was about a mile ahead of the tanker the tug entered the

fog bank (A. 28). The captain of the tug then became disoriented (A. 29); he testified that the tanker's lights appeared off the tug's starboard bow (R. 160). Believing collision to be imminent, the tug captain executed a sharp U-turn to the left (A. 28). This turn took the tug into the path of the oncoming tanker (A. 22).

Meanwhile, the tanker's pilot had sighted the tug visually and on radar more than a mile upstream well over on the Washington side of the channel. The pilot lost visual contact with the tug when it entered the fog (A. 28).[2] The tanker's third mate, who was on the bridge with the pilot and the captain, testified that he visually sighted the tug through binoculars when it was approximately "four points on the port bow"[3] heading downstream (R. 108-110). The mate observed the tug commencing its left turn and immediately notified the pilot, who ordered the tanker's engines full astern and sounded danger signals (A. 29). The tug completed its turn in front of the tanker, but the barge it was towing swung in a wide arc and struck the port bow of the tanker driving it aground on the Oregon bank (A. 21). Estimates of the tanker's speed at the time of collision range between three and seven knots (A. 29).

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[2] While the Court of Appeals stated that the tanker's pilot did not follow the tug's progress by radar (A. 28), the pilot testified that he ascertained the tug's position by radar at least two times after losing visual contact and that one does not *continuously* watch the radar scope in a situation such as this (R. 101-2). The third mate testified that the pilot repeatedly referred to the radar scope after sighting the tug (R. 108).

[3] Four points = 45 degrees.

The district court found that the collision was solely the fault of the tug (1) in navigating at an unreasonable speed in fog; (2) in failing to maintain a proper lookout in order to ascertain the position and course of the tanker; (3) in pulling the tow across the channel; (4) in failing to ascertain the risk of collision and sound the danger signal; (5) in failing to sound fog signals; (6) in failing to reduce speed, stop or take evasive action to avoid crossing the tanker's bow; (7) in turning into the path of the tanker and thereby navigating on the wrong side of the channel; and (8) in failing to keep the tow in control (A. 22). The court found further that the tanker had remained on its own side of the channel (A. 21). The court of appeals concurred in these findings and noted that respondent conceded the tug's negligence (A. 28-9). Nevertheless the court of appeals held that the tanker's speed of seven to eight knots was immoderate and therefore in violation of Article 16 of the Inland Rules (A. 30). Since the tanker was unable to prove that her speed could not possibly have contributed to the collision, she was ordered to share the damages equally with the tug (A. 36).

SUMMARY OF ARGUMENT

The court of appeals held that the tanker Santa Maria was proceeding at an immoderate speed parallel to a fog bank from which the tugboat San Jacinto unexpectedly emerged, because at seven knots the tanker could not stop in one-half her distance from the point at

which the tugboat emerged. This holding is an impermissible interpretation of the statutory command to go at a "moderate speed, *having careful regard to the existing circumstances and conditions.*" The tanker was on the right side of a narrow channel, where it was highly unlikely that she would meet another vessel on a crossing course; the tug had been observed visually and on radar on the other side of the river, and the tanker could rightfully presume that the tug would remain on her side and continue her course; the fog was intermittent; the tanker's pilot was vastly experienced; the low speed required by the court's rule may have been more dangerous than the seven knots at which the tanker was going—all of these circumstances should have been taken into account in determining moderate speed, but were not. The language and legislative history of the statute make it clear that these circumstances should have been considered. Virtually every other court would have considered them. Despite the court's assurances of added safety, the half-distance rule in many cases would be unworkable and would lead to greater danger by causing ships to drop anchor and clog narrow channels. The purpose of Article 16 is to prevent the danger of collision; the tanker's speed did not pose any such danger.

The admiralty rule of dividing damages where both ships in a collision are negligent has become thoroughly discredited and has been rejected by every other major maritime nation. The modern rule, to apportion damages according to fault, has been ap-

proved by this Court, and by Congress in modern maritime legislation, and has the support of judges, government and business. This Court adopted the divided damages rule and has unquestioned authority to change it. Given the extreme disparity of fault in this case (should the tanker be found negligent), justice demands that this Court not apportion damages equally.

ARGUMENT

I. The Half-Distance Rule Is an Impermissible and Unworkable Interpretation of Article 16 of the Inland Rules

The court of appeals held that petitioner's tanker violated Article 16 of the Inland Rules,[4] which reads:

> "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a *moderate speed, having careful regard to the existing circumstances and conditions.*" (Emphasis added).

In reaching its decision the court imparted a gloss to the term "moderate speed," defining it to mean, where a ship is immersed in fog,

> " 'a speed at which she [can] be stopped dead in the water in one-half the visibility before her.' " (A. 30).

Where, as in this case, a ship is navigating *near* fog,

> "The speed and visibility calculations must be performed: '. . . with reference to the distance within which she could be brought to a stop in the water, before *any* course of *any* vessel emerg-

[4] 33 U.S.C. § 192.

> ing from the fog on either side would cross her projected course along the fog bank at its nearest point.' *The Silver Palm*, 94 F.2d 754, 767 (9th Cir. 1937) (Emphasis in original)." (A. 31).

Petitioner's basic contention is that this so-called half-distance rule is an impermissible and unworkable interpretation of Article 16 because it does not have "careful regard to the existing circumstances and conditions." The court disregarded the following circumstances and conditions which, had they been considered, would have led to the conclusion that the tanker's speed was moderate:

1. *The probability of meeting other vessels.* The tanker was navigating parallel to a fog bank in a narrow channel. The probability of its meeting another vessel emerging from the fog bank on a crossing course was slight.[5]

2. *The probability that the tug would act unlawfully.* The tanker observed the tug both visually and on radar proceeding downriver on the Washington side. The tanker was entitled to the presumption that the tug would remain on its side of the river and continue its course. *The Victory*, 168 U.S. 410, 426, 18 S. Ct. 149, 42 L. Ed. 519 (1897); *The Acilia*, 120 F. 455, 461 (4th Cir. 1903); *The Gerry*, 161 F. 413, 418 (1908).

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[5] Article 25 of the Inland Rules: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to the side of the fairway or mid-channel which lies on the starboard side of such vessel." 33 U.S.C. § 210.

3. *The nature of the fog.* The fog was intermittent or "patchy" (A. 21, R. 170-171). The risk of navigating near such a condition is smaller than when the fog is pervasive, especially when, as here, the patches of fog lie off the vessel's course.

4. *The experience of the tanker's pilot.* What is moderate speed when a ship is navigated by an experienced pilot may not be moderate speed when the pilot is inexperienced. Here the pilot was not only vastly experienced in navigation, but had made many voyages on the Columbia and was quite familiar with local conditions and topography.[6]

5. *The dangers of an excessively slow speed.* The speed required by the half-distance rule may have been too slow to maintain steerageway, which would have obliged the tanker to drop anchor and thereby hinder traffic through the channel.

By ignoring these factors and focusing merely on visibility and the ship's stopping ability, the half-distance rule violates the statutory command to have "careful regard to the existing circumstances and conditions," the legislative history and purpose of the statute, the overwhelming weight of judicial authority, and elementary principles of navigation.

A. Legislative History and Purpose of Article 16

Article 16 of the Inland Rules was adopted by

[6] See *The Munster* (1939), 63 Ll. L. Rep. 165, 169 (master's knowledge of local conditions is one of the circumstances considered by the court in determining moderate speed).

Congress in 1897.[7] Its wording is identical to the original wording of Article 16 of the *International* Rules which apply on the high seas, and which were enacted by Congress in 1890.[8] The International Rules were drafted at the 1889 International Conference of Maritime Nations which was attended by jurists, admiralty lawyers and shipowners as well as seafaring men. W. LABOYTEAUX, THE RULES OF THE ROAD AT SEA (1920) 3. The following account of deliberations by delegates to the Conference provides unmistakable evidence of their intended interpretation of the term "moderate speed" in Article 16:

> "This rule was most thoroughly considered and discussed at the International Conference, by which it was regarded as one of the most important rules of the road.
>
> "Many of the delegates held the view that the words 'moderate speed' which were in the then existing rule should be more precisely defined. Some delegates were strongly in favor of fixing a maximum speed beyond which no vessel in a fog should be permitted to proceed. It was, however, the general sense of the Conference that, whilst a more accurate description was desirable, it was impracticable to frame a rule which would precisely define 'moderate speed' as applicable under all the varying circumstances and conditions of navigation.

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[7] Act of June 7, 1897, c. 4, § 1, 30 Stat. 99.

[8] Act of August 19, 1890, c. 802, § 1, 26 Stat. 325. The International Rules were amended in 1948 and again in 1960. The current Article 16, 33 U.S.C. § 1077, differs in wording from Article 16 of the Inland Rules in respects not pertinent here. Article 16 of the Inland Rules has never been amended.

"As was stated by a number of the delegates, the words 'moderate speed,' as used in this rule, constitute a relative term which cannot be so defined as to apply in all cases. What would be a moderate speed under some circumstances, as, for instance, the speed of a steamer in an unfrequented part of the ocean, would be an excessive speed under different conditions, as, *e.g.*, in approaching port where other vessels are apt to be met.

"The views of the Conference are most clearly expressed by the wording of the present rule:

> 'Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard for the existing circumstances and conditions.'

"It was said by the delegate from the United States:

> '. . . in the flexibility of this rule is its safety. Its flexibility permits a man to adapt his speed according to circumstances; and the duty which is put upon him by this rule is that he shall comply with it according to the circumstances under which he finds himself placed.' *Protocol of Proceedings, p. 343.*

"Amongst the circumstances and conditions for which careful regard must be had in determining what shall constitute moderate speed, the following were mentioned in the discussion before the conference:

> The density of the fog and the condition of the weather for hearing fog signals;
>
> Whether the vessel is in narrow waters or on the broad ocean;

Whether on fishing grounds or in frequented or unfrequented waters;

The possibility or probability of meeting other vessels;

The readiness with which a vessel (if laden or in ballast) is able to maneuver;

The quickness with which she can be brought to a standstill with the reserve of steam available for that purpose;

Her position with respect to heavy tideways, strong currents or other dangers." W. LABOYTEAUX, *supra*, at 76-78.

The half-distance rule ignores most of these considerations.

The most recent legislative guide to the interpretation of Article 16 was furnished by Congress' enactment in 1963 of the "Radar Annex" to the International Rules.* This Annex was proposed by the International Conference of 1960 which entitled it "Recommendations on the Use of Radar Information as an Aid to Avoiding Collisions at Sea." Subsection (2) provides:

"A vessel navigating with the aid of radar in restricted visibility must, in compliance with Section 1077(a) [Article 16] of this title, go at a moderate speed. *Information obtained from the use of radar is one of the circumstances to be taken into account when determining moderate speed.*" (emphasis added).

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* Pub. L. 88-131, § 4, September 24, 1963, 77 Stat. 209, 33 U.S.C. § 1094.

Petitioner's tanker determined by radar as well as visually that the tug was proceeding downstream on its own side of the river. Taking this information into account, as the Radar Annex would permit him to do, the pilot of the tanker was entitled to the presumption that the tug would make an ordinary port-to-port passing.[10] *The Victory*, *supra*. Yet the court of appeals rejected petitioner's contention that radar observations were pertinent in determining moderate speed (A. 31-33).

It is evident from these indicia of legislative purpose that a rule which focuses merely on visibility and stopping distance is an impermissible interpretation of the statute.

The fundamental purpose of requiring a ship navigating in or near fog to go at a moderate speed is to prevent it from posing a danger to other vessels. See *The "Colorado,"* 91 U.S. 692, 702-3 (1875); *The Pennsylvania*, 86 U.S. 125, 133-4 (1874).

> "The rule laid in [*The Batavier*, 40 Eng. L. & Eq. 19, 25] is that, at whatever rate a steamer was going, if she was going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate. . . .
>
> "The rule is still maintained . . . in Article 16 . . . ." *The Nacoochee*, 137 U.S. 330, 339, 11 S. Ct. 122, 34 L. Ed. 687 (1890).

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[10] The court of appeals: "Had the tug continued downstream the vessels would have passed safely port to port." (A. 29).

Unless the speed of a vessel in or near fog is so great as to create a danger to other vessels in the area, or which reasonably may be expected to be in the area, it has not violated Article 16. There has been no finding in this case that the Santa Maria's speed posed a danger to other vessels; thus, there is no justification for finding that she violated Article 16.

B. Moderate Speed As Defined by the Courts

The Ninth Circuit Court of Appeals is the only court to adhere to the half-distance rule. The rule adopted by other courts of appeal as well as this Court is that moderate speed is relative and depends upon the circumstances of each case.[11] In *The Pennsylvania*, 86 U.S. 125, 133 (1874), this Court stated:

> "What is [moderate] speed may not be precisely definable. It must depend upon the circumstances of each case. That may be moderate and reasonable in some cases which would be quite immoderate in others."

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[11] Supreme Court: *The Pennsylvania*, 86 U.S. 125 (1874); *The Chattahoochee*, 173 U.S. 540, 19 S. Ct. 491, 43 L. Ed. 801 (1899); *The Umbria*, 166 U.S. 404, 17 S. Ct. 610, 41 L. Ed. 1053 (1897).

First Circuit: *Gertrude Parker, Inc.* v. *Abrams*, 178 F.2d 259, 264 (1949).

Second Circuit: *Polarus S/S Co.* v. *The T/S Sandefjord*, 1956 A.M.C. 1779, 236 F.2d 270 (1956).

Third Circuit: *The Bohemian Club*, 134 F.2d 1000 (1942), rev'd on other grounds, 320 U.S. 462, 64 S. Ct. 225, 88 L. Ed. 168 (1943).

Fifth Circuit: *Hess Shipping Corp.* v. *SS Charles Lykes*, 417 F.2d 346 (1969), aff'd on reh. en banc, 424 F.2d 633, cert. den. 400 U.S. 853, reh. den. 400 U.S. 931.

Seventh Circuit: *Erie & W. T. Co.* v. *City of Chicago*, 178 F. 42 (1910).

In *The "Colorado,"* 91 U.S. 692, 702 (1875):

> "Great difficulty would attend any effort to define, with mathematical precision, what is a moderate speed in any particular case, further than to say that the speed ought not to be so great that the steamer cannot perform the duty imposed upon her by the Act of Congress—'to keep out of the way of the sailing vessel,' *if the latter has in all respects complied with the rules of navigation.*" (Emphasis added).

Justice Addison Brown, an acknowledged admiralty authority, frequently considered the issue of moderate speed in fog. In *The Chattahoochee*, 173 U.S. 540, 19 S. Ct. 491, 494, 43 L. Ed. 801 (1899), he stated:

> "No absolute rule can be extracted from these cases. [The Court examined English and American cases involving excessive speed.] So much depends upon the density of fog *and the chance of meeting other vessels in the neighborhood*, that it is impossible to say what ought to be considered moderate speed under all circumstances." (Emphasis added).

Circumstances which Justice Brown felt were relevant include

> "the density of the fog; the place of navigation; the probable presence of other vessels likely to be met; the state of the weather as affecting the ability to hear the fog signals of other vessels at a reasonable distance; the full speed of the ship herself, her appliances for rapid maneuvering, and the amount of her steam power kept in reserve, as affecting her ability to stop quickly after

> hearing fog signals." *The Normandie*, 43 F. 151, 156 (S.D. N.Y. 1890).

See also *The Martello*, 154 U.S. 64, 70, 14 S. Ct. 723, 725, 38 L. Ed. 637 (1893); *The Umbria*, 166 U.S. 404, 17 S. Ct. 610, 41 L. Ed. 1053 (1897).[12]

The rule in England is in accord with these decisions. See, e.g., *The Bharatkhand*, (1952) 1 Lloyd's List L.R. 470. Under English doctrine, the mere fact that there is fog in the vicinity does not make it obligatory to navigate at a moderate speed. See *The Bernard Hall*, (1902) 9 Asp. M.C. 300.

Ironically, the Ninth Circuit's half-distance rule seems to have originated in a misinterpretation of *The Chattahoochee* and *The Umbria*. See *The Silver Palm*, 94 F.2d 754, 757 (9th Cir. 1937). Presumably *The Silver Palm* derived its rule from the following statement:

> "It has been said by this Court in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law." *The Chattahoochee*, 19 S. Ct. at 494; see also *The Umbria*, 17 S. Ct. at 616.

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[12] Of the cases cited in this paragraph only *The Umbria* was decided expressly under Article 16. The others were decided under the predecessor to Article 16, Rule 21 of The Rules of 1864, 13 Stat. 58, which commanded that "every steam vessel shall, when in a fog, go at a moderate speed." Article 16 did not change the moderate speed rule of these earlier cases. *The Nacoochee, supra*, 137 U.S. at 339.

Indeed, if this language *had* inspired the half-distance rule it would render the rule inapplicable to this case because the San Jacinto was not "going at the moderate speed required by law" (Finding of Fact (5) (c) at A. 23). But it is highly questionable whether this language supports a half-distance rule; at most it is the expression of a truism which the Court could not have intended to be the *test* of moderate speed.[13]

If this Court were to affirm the court of appeals' application of the half-distance rule it would be departing from the overwhelming consensus of judicial authority, altering the rule observed in at least five circuits, and establishing an American rule that would be unconsonant with the English rule—thus violating the principle of uniformity of maritime law upheld by this Court in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917).

C. The Asserted Virtues of the Half-Distance Rule

The court of appeals declares that the half-distance rule takes from the pilot's hands discretion as to what speed is reasonable under the prevailing circumstances and substitutes "a formula to fit all circumstances"

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[13] *The Umbria* and *The Chattahoochee* have also been cited for the proposition that moderate speed means "the lowest rate of speed consistent with good steerage way." *The Chattahoochee*, 19 S. Ct. at 494. However, this dictum has been properly recognized as being merely a reference to one of the circumstances which must be taken into account in deciding a case. See *Polarus S/S Co.* v. *T/S Sandefjord*, *supra*, note 11 at 272.

(A. 35). The court did not pause to consider whether it was free to adopt this position in view of the statutory language and legislative history.[14] The court's position also ignores the view of this Court that "in cases of this kind . . . something must be left to the judgment and discretion of the master," *The Umbria*, 17 S. Ct. at 615, and that Article 16 gives a navigator "discretion as to what shall be 'moderate speed' in a fog," *Lie* v. *San Francisco and Portland Steamship Co.*, 243 U.S. 291, 37 S. Ct. 270, 61 L. Ed. 726 (1917). The flaw in the appellate court's reasoning is that it *cannot* fashion a formula to fit all circumstances. The futility of such an exercise was expressed by the United States delegate to the 1889 International Conference:

> "So you will find it impossible to lay down a definite rule as to what moderate speed means under all the different and differing circumstances in which vessels will find themselves placed."

Quoted in KNIGHT, MODERN STEAMSHIP (10th ed. rev. 1941) 387. This view has been reiterated frequently in court opinions. See, e.g., the excerpt from Justice Brown's opinion in *The Chattahoochee* quoted at page 16, supra.

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[14] The British delegate addressing the 1889 International Conference in opposition to amending the second paragraph of Article 16 to require a mandatory stop: "I think it would not be wise to put that into the rules, because, *as has been often said with regard to this rule*, what we ought to avoid is the taking of the command of the vessel out of the seaman's hands. *Give him general rules and then let him be responsible for his conduct.*" The delegate's position was sustained by the Conference. LABOYTEAUX, *supra*, note at 88-97 (emphasis added).

Indeed, there is no more striking evidence of the unworkability and perniciousness of such a "universal" formula than the unjust result of its application of the facts of this case. Petitioner's tanker sighted the tugboat heading downstream and concluded, quite reasonably, that the tug would make a normal port-to-port passing.

> "Each of these vessels was entitled to presume that the other would act lawfully; would keep to her own side; if temporarily crowded out of her course, would return to it as soon as possible; and that she would pursue the customary track of vessels in the channel, regulating her action so as to avoid danger. * * * The rule applicable to them was that each should keep to her own starboard side of the channel." *The Victory*, 168 U.S. 410, 426, 18 S. Ct. 149, 156 (1897).[14]

The tanker posed no danger to the tug until the tug executed an unexpected, "erratic" and illegal turn. The tanker was not obliged to anticipate the tug's improper navigation. See *The Victory*, supra, 18 S. Ct. at 157; *Great Lakes Dredge & Dock Co.* v. *The Santiago*, 155 F.2d 148, 150 (2d Cir. 1946). Until the tug began its turn there was no significant risk of collision. See *The Victory*, 18 S. Ct. at 154, 156. The tanker's speed did not pose any danger to any vessel, and therefore was moderate. *The "Colorado,"* 91 U.S.

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[14] Compare *The Martello*, supra, 14 S. Ct. at 725, where a steamer was held to have been speeding "in a neighborhood where she is likely to meet vessels approaching the harbor from at least a dozen points on the compass."

692, 702-3 (1875); *The Nacoochee*, 137 U.S. 330, 339 (1890).

The court of appeals asserts that the half-distance rule "comes down hard on the side of safety" (A. 35). Again, the court does not inquire whether the language and intent of the statute permits it such latitude. Nor does the court consider whether it is more qualified to formulate a rule of navigational safety than the expert draftsmen of Article 16. In reality, the half-distance rule in some situations would *sacrifice* safety.

To begin with, there is the statement of the rule itself: where a vessel is navigating near a fog, "speed and visibility calculations must be performed: '* * * with reference to the distance within which she could be brought to a stop in the water, before *any* course of *any* vessel emerging from the fog on either side would cross her projected course along the fog bank at its nearest point.'" (A. 31). With all due respect to the court of appeals, this formula is unintelligible. For an illustration of the complicated charts, diagrams, and tabulations it calls for, see the opinion in *The Silver Palm*, 94 F.2d 754 (9th Cir. 1937). Presumably the court of appeals feels that these calculations are readily performable by a pilot maneuvering his ship in reduced visibilty. One wonders how the captain of the *tugboat* would have approached this problem, given his already confused condition. The court of appeals' *own* application of the rule does not shed any light on its meaning. A reasonable reading

of the rule would be this: where a ship is proceeding parallel to a fog bank *and reasonably can expect other vessels to emerge from the fog on a collision course* (a factor absent here), she should be able to stop before reaching a possible point of collision. But the court of appeals goes further than this: it holds that the ship must be able to stop *half way* to this point—even when there is no reason to expect emerging vessels! There is no justification for imposing such an excessive margin.

Strict adherence to the half-distance rule in this case could have resulted in chaos. The court of appeals calculated that the maximum lawful stopping distance of the tanker was 450 feet. While there is no evidence of the tanker's stopping ability, it is fair to assume that a ship over 500 feet in length with a 17,000 ton load would have to be traveling at a virtual snail's pace in order to stop in less than its own length. If the speed required was less than bare steerageway, then the tanker could have safely complied with the half-distance rule *only by dropping its anchor as it approached the fog.* The tanker then would have been obliged to remain at anchor until the fog lifted, even after the tug passed, for under the court of appeals' analysis, a radar observation that the fog bank contained no vessels would not remove the need for observing the half-distance rule (A. 33). Thus, any vessels which might have been following the tanker would have been faced with the choice of likewise dropping anchor or going around the tanker—

through the fog and against traffic![14A]

To summarize our contentions on this issue, the court of appeals has applied as a legal standard a mere rule of thumb which fails to take into consideration all of the circumstances required to be considered by the statute being enforced. In so doing, the court has reached a result which not only works an injustice to petitioner, but also establishes an unworkable standard of conduct for the future.

II. If Petitioner's Tanker Is Found Negligent and a Contributing Cause of the Collision, Damages Should Be Allocated Between the Vessels in Proportion to Their Respective Faults.

If the Court remands this case for a determination of whether the tanker's speed was moderate, it should also direct the district court that if it should find the tanker in violation of the moderate speed rule, it should allocate damages between petitioner and respondent in proportion to their respective degrees of fault. By respective degrees of fault we mean the degree to which each vessel by its misconduct contributed to the collision. It is necessary for this Court to decide this issue in order that the district court may fully be able to render justice to the parties. There is no impediment to the Court's deciding this issue; the state of the record is such that

[14A] 33 U.S.C. § 409:

"It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; * * *."

all of the facts necessary to an informed decision are before the Court, and no issue of constitutional magnitude is presented so as to invite the Court's traditional reluctance to decide constitutional issues. Alternatively, if this Court affirms the court of appeals' finding of negligence on the part of the tanker, then it should remand the case to the district court for apportionment of damages.

The court of appeals ordered damages equally divided between petitioner and respondent. The admiralty rule of equally divided damages, which applies when two vessels collide as the result of the negligence of both, has long been criticized as being primitive and unjust. The severe inequity of this rule is amply demonstrated by its application in this case. The court of appeals itself acknowledged that the fault of the tug was "more flagrant and shocking" than that of the tanker. The tug was negligent in speeding in fog, in failing to give appropriate signals, in failing to maintain a proper lookout, in making a U-turn across the path of the Santa Maria and in failing to keep the barge it was towing under control (A. 22). On the other hand, the claimed fault of the Santa Maria (speed only) is questionable; at most it amounted to, in the words of the district court, a "possible technical violation" (A. 24-25). It must also be noted that the court of appeals made no finding that the tanker's statutory violation contributed to the collision.[15] Thus, there is not only a great disparity of

[15] Under the rule of *The Pennsylvania*, supra, where a

culpability between the vessels, but the tanker's claimed error may not even have contributed to the collision! To divide damages equally in such a situation is manifestly unjust.

The rule of divided damages was adopted by this Court in *The Schooner Catharine* v. *Dickinson*, 58 U.S. (17 How.) 170 (1854). The Court applied the rule without careful consideration of its merits—observing only that it prevailed in lower federal courts, was the well settled rule in England, and was "the most just and equitable, and as best tending to induce care and vigilance on both sides, in the navigation." 58 U.S. at 177-8.[16] It is remarkable that this Court has applied the rule repeatedly since 1854 without ever analyzing its implications. In the meantime, lower federal courts have protested the rule, England has long since repudiated it, and its supposed equitability is acknowledged by virtually no one.

The rule has been criticized repeatedly by lower federal courts as being "unfair,"[17] "illogical,"[18] "un-

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ship involved in a collision has violated a statute, it has the burden of proving that its violation *could not possibly* have been a contributing cause.

[16] The divided damages rule was adopted in England in the 1824 case of *Hay* v. *LeNeve*, 2 Shaw's Reports, 395. As in *The Schooner Catharine*, the English court did not give full consideration to the rule's implications, and based its decision on dicta from an earlier case. For a discussion tracing the rule's origin back to the medieval Laws of Oleron, see Sprague, "Divided Damages in Admiralty," 6 N.Y.U.L. Rev. 15 (1928).

[17] *Ahlgren* v. *Red Star Towing and Transp., Co.*, 214 F.2d 618, 620 (2d Cir. 1954).

[18] *Marine Fuel Transfer Corp.* v. *The Ruth*, 231 F.2d 319, 321 (2d Cir. 1956).

just" and "arbitrary,"[19] "antiquated,"[20] "not altogether rational" and a "vestigial relic"[21]. A few courts have attempted to defy the rule and apportion damages fairly. In *The Margaret*, 30 F.2d 923 (3rd Cir. 1928-9), the Third Circuit Court of Appeals ordered a division of 75%-25%, but modified to half-damages on rehearing, believing itself constrained by the Supreme Court rule. The Second Circuit has been more bold; in *The Ruth*, 135 F. Supp. 371 (1955), the district court ordered 60%-40% apportionment, which was affirmed without comment by the court of appeals. See 231 F.2d 319 (1956).

Even this Court has acknowledged the rule's potential for injustice. In *The Umbria*, 166 U.S. 404,

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[19] *Tank Barge Hygrade* v. *The Gatco N.J.*, 250 F.2d 485, 488 (3rd Cir. 1957).

[20] *National Bulk Carriers, Inc.* v. *United States*, 183 F.2d 405, 410 (Learned Hand, dissenting) (2d Cir. 1950), cert. den. 71 S. Ct. 89.

[21] *Oriental Trading and Transport Co.* v. *Gulf Oil Corp.*, 173 F.2d 108, 111 (2d Cir. 1949), cert. den. 69 S. Ct. 1162.

Other decisions critical of the rule include: *In re Adams Petition*, 125 F. Supp. 110 (S.D. N.Y. 1954); affd. 237 F.2d 884 (2d Cir. 1956), cert. den. 352 U.S. 971, 77 S. Ct. 364 (1957); *Luckenbach S. S.* v. *United States*, 157 F2d 250 (2d Cir. 1946); *The City of Chattanooga*, 79 F.2d 23 (2d Cir. 1935); and *St. Louis-San Francisco Ry.* v. *M/V D. Mark*, 243 F. Supp. 689 (S.D. Ala. 1965).

Examples of academic criticism are: Staring, "Contribution and Division of Damages in Admiralty and Maritime Cases," 45 Cal. L. Rev. 304 (1957); Albritton, "Division of Damages in Admiralty—A Rising Tide of Confusion," 2 Journal of Maritime Law and Commerce, 322 (1971); Jackson, "The Archaic Rule of Dividing Damages in Marine Collisions," 19 Ala. L. Rev. 263 (1967); Mole & Wilson, "A Study of Comparative Negligence," 17 Corn. L. Q. 333 (1932); and Huger, "The Proportional Damage Rule in Collisions at Sea," 13 Corn. L. Q. 531 (1928).

17 S. Ct. 610, 41 L. Ed. 1053 (1897), a case involving a factual situation much like the one here, the Umbria was proceeding full speed through a fog when it collided with the Iberia, which had improperly changed course. Even though both vessels were clearly negligent, this Court applied the rule of *The City of New York*[22] to hold the Umbria *solely* at fault because of its "gross" misconduct. 17 S. Ct. at 612-613. The irony of this decision is that in seeking to avoid the unfairness of arbitrarily dividing damages between the vessels, the Court chose to arbitrarily *absolve* one vessel from its fault and subject the other to liability *in excess of* its fault.

Perhaps the most telling criticism of the equal division rule is the oft-noted fact that the United States is the only major seafaring nation in the world to adhere to it. See Staring, "Contribution and Division of Damages in Admiralty and Maritime Cases," 45 Cal. L. Rev. 304, 340-341 (1957). The other nations—including England, from which we obtained the rule—have adopted the 1910 Brussels Collision Convention which allocates fault proportionately in cases where it is possible to do so.[23] The rule which peti-

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[22] 147 U.S. 72, 85 (1893) "* * * Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

[23] Relevant parts of the Convention are reproduced in the Appendix to this brief.

tioner asks this Court to adopt is set out in the first paragraph of Article 4 of the Convention:

> "If two or more vessels are in fault, the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally."

It should be noted that petitioner is not asking this Court to abandon completely the half-damages rule. In cases where it is impossible to determine relative fault, or where the faults are equal, the rule proposed by petitioner would require equal apportionment of damages. But in cases where the evidence establishes a disparity of fault, as in this case, damages should be allocated proportionately.

By adopting the proposed rule of comparative fault this Court would bring the American rule into harmony with the rule of every other major maritime nation and thus serve the objective of a uniform maritime law which was extolled in *Southern Pacific* v. *Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917). One consequence of our rule being out of step with the rest of the maritime world is transatlantic forum shopping. See G. GILMORE AND C. BLACK, JR., THE LAW OF ADMIRALTY (1957), 439. The authors postulate a case in which Vessel A is damaged $100,000 and would be 80% at fault, while Vessel B, 20% at fault, is damaged $50,000. In the United States Vessel B would have to pay Vessel A $25,000, while in

a country adhering to the Brussels Convention, Vessel A would have to pay Vessel B $20,000. In many collision cases, the authors conclude, "getting the case into a United States court is a tactical prize of great cash value." *Id.* at 439-440. See, e.g., *Isbrandtsen Co.* v. *Lloyd Brasiliero*, 85 F. Supp. 740 (E.D. N.Y. 1949).

Adopting the proposed rule would also bring harmony to our own system of admiralty law by eliminating the anomaly of applying a mutual fault rule where property damage is involved, and a comparative fault rule where personal injury is involved. See *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953).

It is important to note that in its brief in opposition to our petition for writ of certiorari, respondent does not contradict any of our contentions as to the merits of the mutual fault rule; rather, respondent's sole argument is that Congress, and not this Court, should change the rule (Br. 18). In support of this argument, respondent recites that the rule has been "settled law" for over 100 years, and that neither Congress nor private interests are seeking to change it. None of these contentions has merit. Where there is virtual unanimity of opinion that a judicial rule is inequitable, the fact that it is an *old* rule hardly justifies its continued observance. See *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 403-5, 90 S. Ct. 1772, 26 L. Ed. 339 (1970). It must be remembered that this is a *judicial* rule, and what judges have made, judges generally can unmake. It must also be

remembered that the mutual fault rule is a rule of *damages* and not one which regulates conduct directly; thus, there is absent from this case the problem of upsetting the settled expectations of parties who would be affected by a change in the rule. See 398 U.S. at 403-4. This Court has long maintained that damages in admiralty are given or withheld upon enlarged principles of justice and equity and are within the discretion of the courts. *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827).

Some of the most creative law-making of this court has taken place in the field of admiralty. *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, 339 U.S. 684, 70 S. Ct. 861, 94 L. Ed. 1206 (1950). This is especially so in the area of remedies. In *The Max Morris*, 137 U.S. 1 (1890), the Court refused to apply the common law doctrine of contributory negligence in an admiralty case, which would have barred a longshoreman from recovering from a vessel for personal injury. In so ruling, the Court affirmed a decree mitigating damages to the extent of the longshoreman's negligence. This decision was subsequently implemented by Congress in the Merchant Marine (Jones) Act, 46 U.S.C. § 688. *The Max Morris* rule was extended to *civil* actions for maritime personal injuries brought in federal courts in *Pope & Talbot, Inc.* v. *Hawn*, supra. The following statement by the Court in that case is particularly pertinent:

> "The harsh rule of the common law under which contributory negligence wholly barred an

injured person from recovery is completely incompatible with modern admiralty policy and practice. *Exercising its traditional discretion,* admiralty has developed and now follows its own *fairer and more flexible* rule which allows such consideration of contributory negligence in mitigation of damages *as justice requires.*" 346 U.S. at 408-9 (Emphasis added).

The most recent example of this Court's broad discretion over maritime tort remedies is *Moragne* v. *States Marine Lines, Inc.*, supra, where the Court created a remedy for wrongful death arising from unseaworthiness in state territorial waters. These decisions illustrate that it is exceptional for the Court to defer to the legislature on matters of maritime tort remedy.[24]

Respondent points out that Congress has twice declined to adopt the 1910 Brussels Convention. The convention was first submitted to the Senate in 1937. KNAUTH, BENEDICT ON ADMIRALTY (7th ed. rev.) 38. It was not ratified for two reasons: a poor translation of the French text resulted in a misunderstanding regarding the Convention's effect upon certain

[24] One such exception was *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S. Ct. 277, 96 L. Ed. 318 (1952). A ship repairer's employee was injured while making repairs on a ship. The employee sued the ship owner for negligence and unseaworthiness, and the ship owner sought contribution from the ship repair company for its negligence. The Court denied contribution, in part because it was uncertain as to the manner in which a contribution scheme would operate in conjunction with the Longshoremen's and Harbor Workers' Compensation Act. 342 U.S. at 280. In the present case, there is no danger of the comparative fault rule being incompatible with federal legislation.

legal presumptions; and cargo interests objected to the second paragraph of Article 4 which eliminates joint and several liability of the vessels for cargo damage. *Staring, supra,* at 343. For a thorough discussion of this opposition, see Note, "The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Convention to Achieve International Agreement on Collision Liability, Liens and Mortgages," 64 Yale L.J. 878 (1955). The Convention was resubmitted to the Senate in 1962. Again, cargo owners opposed adoption because it would not permit them to recover their losses in full from the non-carrying vessel. BAER, *Admiralty Law of the Supreme Court* (2d ed.) 414-5. *The rule advocated by petitioner would not change in any way the cargo owner's right to recover from the non-carrying vessel.* Petitioner's rule would amount to the adoption only of the first paragraph of Article 4, and not the second. Since this rule would not affect cargo owners, they would have no objections to its adoption.

American shipowners are enthusiastically in favor of the change. Note, 64 Yale L.J. at 882. It will prevent their having to pay a part of the loss in excess of their ship's proportionate degree of fault, and also the inequitable result of a grossly negligent vessel not having to pay her share of the loss. See Huger, "The Proportional Damage Rule in Collisions at Sea," 13 Corn. L. Q. 531, 546 (1928). The Departments of State and Commerce, and the Maritime Commission, are on record as supporting the convention in the strongest terms. See Note, 64 Yale L.J. at 890. It is unlikely that insurance companies would object to

the change; since the vast majority of ship collision cases are prosecuted as well as defended by insurance companies, 13 Corn. L.Q. at 546 n. 52, a change in the legal principles apportioning liability would have no effect on the industry as a whole. Individual insurance companies might be hurt if they made a practice of insuring bad risks, but even this could be compensated by higher premiums, which would promote a more equitable allocation of insurance costs.

The admiralty bar in 1961 voiced its approval of "the basic principles" of the Convention. See THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, REPORT No. 452, at 4854-57 (Feb. 1962).[25] This approval marked a change in the position of the organized bar. In 1928, the American Bar Association recommended against adopting a comparative fault rule in collision cases. See Mole & Wilson, "A Study of Comparative Negligence," 17 Corn. L. Q. 333, 348 (1932). While it is highly doubtful that the A.B.A. would reaffirm its position today, it nevertheless is worth considering its objections to comparative fault in 1928, as reported by Mole & Wilson at 348-59.

1. *The rule of proportionate damages would impose too great a burden on judges.* It has been said that the difficulty in assigning degrees of fault is the *only* plausible objection to the rule. See G. GILMORE

[25] A resolution to this effect was adopted by a vote of 166 to 84. The minority group objected to approval of the provision of the Convention which would eliminate joint and several liability to cargo owners. See BAER, supra, at 414, 415 n. 17.

AND C. BLACK, supra, at 440. Nonetheless, countries which have adopted the Brussels Convention report no difficulty in applying it. See Mole & Wilson at 348; also *In re Adams Petition*, 125 F. Supp. 110, 114 aff'd 237 F.2d 884 (2d Cir. 1956), cert. den. 352 U.S. 971, 77 S. Ct. 364 (S.D. N.Y. 1954). Judges are now called upon by both state and federal law—including maritime statutes—to apportion fault by degrees. See, e.g., Merchant Marine (Jones) Act, 46 U.S.C. § 688; Death on the High Seas Act, 46 U.S.C. § 766; Federal Employers Liability Act, 45 U.S.C. § 51-59; and see PROSSER, LAW OF TORTS (4th Ed.) 435-438, for a listing of the dozens of state comparative negligence laws. Judges occasionally may be inaccurate in allocating fault in precise percentages, but such minor imperfections are preferable to the gross misallocations which occur under the present rule.

2. *The "in extremis" rule*[26] *would be emasculated.* In point of fact, the in extremis rule would operate precisely the same under comparative fault. If a ship has not been negligent so as to place herself in jeopardy, she will be absolved from blame; but if her prior negligence has caused her predicament, she should bear her proportionate share of the damages. See Mole & Wilson at 351.

3. *The City of New York rule is sufficient for*

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[26] A vessel in imminent danger of collision owing *solely* to the fault of another vessel is not held to strict accountability for her acts in such emergency. See *Villain & Fassio E. Campagnia* v. *Tank Steamer E. W. Sinclair*. 207 F. Supp. 700 (S.D. N.Y. 1962), aff'd 324 F.2d 563.

practical purposes. As we have pointed out, the *City of New York* rule is *in*sufficient from a standpoint of fairness. If a vessel has been negligent, even to a minor degree, it should not be absolved from fault—and the other vessel penalized—simply because the other vessel's negligence was more flagrant.

4. *Collision litigation would be carried to common law courts.* Collision cases may be tried in common law courts under the present rule. There is no apparent reason for not permitting this to continue under a comparative fault rule. In any event, this presumed problem could be corrected by legislation if necessary.

5. *Appeals would be increased and compromises made more difficult.* This argument is speculative. Under the liberalized discovery rules, the relative faults of the vessels will be evident to the parties prior to trial. The vessel more at fault will have a greater incentive to settle under a comparative fault rule than under the mutual fault rule. Also, under the mutual fault rule a ship owner whose vessel has been substantially less negligent than the other vessel would be inclined to take his chances in being exculpated by a court rather than agree to a 50-50 settlement. Nor would appeals be increased. The trial judge has great latitude in awarding damages, and his judgment should not lightly be disturbed. *Drake* v. *E. I. Du Pont deNemours & Co.*, 432 F.2d 276 (5th Cir. 1970); *cf. McAllister* v. *United States*, 348 U.S. 1, 75 S. Ct. 6, 99 L. Ed. 3 (1954). Since appellate review of damage apportionment would be highly

restricted, appeals would be discouraged. See *Norton* v. *Warner*, 321 U.S. 565, 64 S. Ct. 747, 749-750, 88 L. Ed. 931 (1944). English admiralty courts employ the same rule. See *The Peter Benoit*, 84 L.J.R. 87 (1915).

Respondent would have this Court conclude from Congress' unreadiness to enact the Brussels Convention *in toto* that Congress disapproves of the principle of comparative fault. As we have shown, Congress' inaction was unrelated to the Convention provision respecting comparative fault. To obtain an accurate perception of congressional policy, this Court must examine the whole course of congressional enactments in the field of maritime tort law, as it did in *Moragne* v. *States Maritime Lines, Inc.* See 398 U.S. at 392-3. Since this Court's adoption of the mutual fault rule in 1854, Congress has enacted the Federal Employers Liability Act, the Merchant Marine (Jones) Act,[27] and the Death on the High Seas Act—all of which provide for comparative negligence, the latter two involving maritime torts.[28] This legislative trend is compelling evidence that Congress in fact supports the principle of comparative fault.[29]

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[27] It will be recalled that Congress was inspired to enact the Jones Act by this Court's decision in *The Max Morris*.

[28] This federal trend toward liability in proportion to fault has been mirrored by state legislative enactments adopting the comparative fault standard. See PROSSER, supra, at 435-8.

[29] In *Moragne* this Court created a remedy for wrongful death arising from unseaworthiness after concluding that Congress had given no affirmative indication of an intent to *preclude* such remedy. 398 U.S. at 393.

In the final analysis, the mutual fault rule has been thoroughly discredited. Judges, scholars, lawyers, the executive branch and the shipping industry seek adoption of the comparative fault rule. Comparative fault has been widely implemented by federal and state legislation. Since the comparative fault rule is remedial in nature, a rule of damages within traditional judicial discretion, and a rule in the realm of this Court's broad admiralty powers, there is no obstacle to its adoption by this Court. Such action by the Court would be consistent with the modern admiralty policy expressed in such decisions as *Pope & Talbot* and *Moragne*, as well as in modern legislation, to develop "fairer and more flexible" rules "as justice requires." *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. at 409. The mutual fault rule is repugnant to this policy. It is a legal dinosaur which has no place in the law books of the 20th century. The need for its abrogation by this Court was well-stated by a distinguished admiralty practitioner:[30]

> "The present practice is a discredit to admiralty, which prides itself on its enlightened justice, flexibility, and equity and has formerly pointed out the path of progress to common law jurisdictions that today, in this vital matter, have overtaken and passed it. This is not the result of a lack of desire on the part of the admiralty judges but of the failure of the admiralty bench and bar to consult their history and to appreciate that, if they desire justice, they have only to do it."

[30] Staring, supra, at 344.

CONCLUSION

Petitioner requests that the decision of the court of appeals be reversed and the judgment of the district court reinstated; or in the alternative, that the case be remanded to the district court for a determination of the question whether the Santa Maria's speed was moderate, with instructions to allocate damages in proportion to fault should the Santa Maria be found negligent. If the Court affirms the court of appeals' finding of negligence on the part of the Santa Maria, then it should remand this case to the district court for allocation of damages in proportion to fault.

Respectfully submitted,

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APPENDIX

ARTICLES 1 THROUGH 4 OF THE BRUSSELS COLLISION CONVENTION OF 1910

Article 1. Where a collision occurs between seagoing vessels or between seagoing vessels and vessels of inland navigation the compensation due for damages caused to the vessels, or to any things or persons on board thereof, shall be settled in accordance with the following provisions, in whatever waters the collision takes place.

Article 2. If the collision is accidental, if it is caused by *force majeure*, or if the causes of the collision are in doubt, the damages shall be borne by those who have suffered them.

This provision shall be applicable notwithstanding the fact that the vessels, or any of them, may be at anchor (or otherwise made fast) at the time of the casualty.

Article 3. If the collision is caused by the fault of one of the vessels, liability to make good the damages shall attach to the one which has committed the fault.

Article 4. If two or more vessels are in fault the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally.

The damages caused either to the vessels, or to their cargoes, or to the effects or other property of the crews, passengers, or other persons on board, shall be borne by the vessels in fault in the above proportion without joint and several liability toward third parties.

In respect of damages caused by death or personal injury, the vessels in fault shall be jointly as well as severally liable to third parties, without prejudice to the right of recourse of the vessel which has paid a larger part than that which in accordance with the provisions of the first paragraph of this article she ought ultimately to bear.

It is left to the law of each country to determine, as regards such recourse, the scope and effect of any legal or contractual provisions which limit the liability of the owners of a vessel toward persons on board.

In the Supreme Court
of the United States

OCTOBER TERM 1971

No. 71-900

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Petitioner,

v.

The Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III, their engines, boilers, tackle, apparel and furniture; and STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation,

Respondents.

BRIEF FOR RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Respondents do not accept petitioner's statement of the questions presented for review, and submit they are more accurately stated as follows:

1. Was it appropriate for the Court of Appeals to hold that the speed of the tanker SANTA MARIA was in excess of the "moderate speed" required by Article 16(a) of the Inland Rules (33 U.S.C. § 192) under circumstances where:

(a) The SANTA MARIA was a large vessel proceeding up a narrow river channel toward a fog bank,

(b) The SANTA MARIA knew that a downcoming tug and its barge in tow were concealed in the fog bank, but could not see the tug and tow or its change of course because of the fog,

(c) The SANTA MARIA maintained a speed of 7-8 knots (half speed), at which speed she could not be stopped before reaching the point where she first visibly saw the tug and tow emerge from the fog on a right angle course, but instead was still going 3 to 7 knots at the moment of collision, and

(d) The SANTA MARIA could have reduced to substantially slower speed (slow speed) and still maintained good steerage way?

2. Should the rule that in mutual fault collision cases the damages are divided equally, which has been the established law of the United States for over a hundred years, be changed in favor of proportional fault, and if so, should this be done by judicial decision or by legislation?

STATEMENT OF THE CASE

Petitioner's "statement of the case" should not be accepted. A fair statement is set forth in the Court of Appeals opinion (A. 27-29).[1]

The essential facts are that SANTA MARIA was a large tanker, 550 feet long, 11,291 gross tons, fully loaded with 17,000 tons of petroleum products. She was proceeding upstream, in darkness at night, in a narrow channel of the Columbia River. She maintained a speed of 7 to 8 knots[2] while approaching a fog bank that concealed the downcoming tug and barge.[3] The SANTA MARIA knew of the presence of the tug and barge, but could not see their position or change of course because of the fog.

The tug crew sighted the mast lights of the SANTA MARIA looming through the fog, at less than 1,000 feet distance. Fearing imminent collision, the tug executed a sharp U-turn to its left and tried to run away from the tanker (R. 161, 187, Ex. 25, R. 117-19). The tug actually completed the U-turn, and was making headway up river, going in the same direction as the SANTA MARIA, at the time of the colli-

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[1] The Court of Appeals decision is now reported 451 F.2d 1369, and is also set forth in Appendix to the Petition for Certiorari. References herein will be to the Appendix, as A. 26-37.

[2] One knot (nautical mile) = 6,000 ft.; 1 knot speed = 100 ft. per minute; 8 knot speed = 800 ft. per minute.

[3] The tug was 110 feet long, twin screw, 1500 HP; the barge was 275 feet long, on a 250 foot towline. They were proceeding at 7 knots, and slowed to 3½ knots on first hearing SANTA MARIA'S fog signal (R. 155, 171, 219).

sion. The barge followed behind the tug on its tow line, and was headed diagonally up river when struck by SANTA MARIA (Ex. 25, R. 117-19).

The SANTA MARIA sighted the tug emerging from the fog bank at about 900 feet distance, at which moment the tug was in the middle of its U-turn and proceeding across and at right angles to the course of the tanker.[4] SANTA MARIA immediately went full astern, but in one minute collided with the barge (Ex. 25, R. 117-19, 80, 111, 188, 192, 224, and see diagram p. 5 of Br. in Opp. to Pet. for Cert.).

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[4] Petitioner's "Statement of the Case," (Pet. Br. 5) while admitting that SANTA MARIA's pilot lost visual sight of the tug in the fog (A. 28) states that her third mate saw the tug through binoculars and saw her commence the turn. This is contrary to the district court's express findings of fact.

The evidence from SANTA MARIA's witnesses was conflicting and contradictory. Her lookout on the bow testified "it was pretty foggy . . . it was thick fog" (Ex. 28, R. 150, pp. 6-7). The third mate (still a junior officer at age 58) was less than clear in his testimony and admitted he was blowing fog signals (R. 114-115). Her attorney stated that the tug "disappeared into a localized fog bank" (R. 9).

The tug's witnesses testified they were in a thick fog, and although they heard SANTA MARIA's fog signal, and were looking intently, they were unable to see SANTA MARIA's lights until they loomed up almost dead ahead within 250-300 yards (R. 155, 158-60, 176, 182, 205, 216, 222, 223).

This conflicting testimony was resolved by the district court's express fact findings that the tug and barge proceded "towards, into and through a fog bank" (A. 23); that

> "Prior to the collision the SS SANTA MARIA lost visual contact with the tug though she herself was out of the fog." (A. 21);

and then, when SANTA MARIA was "on the edge of the fog bank, she sighted the tug SAN JACINTO headed across her bow" (A. 21). These findings are conclusive against Union Oil on that issue of fact.

At her "half-speed" of 7-8 knots, SANTA MARIA was unable to stop before reaching the point where the tug and barge emerged from the fog. Indeed she was still going 3-7 knots at the moment of impact (A. 29).

SANTA MARIA could have reduced to a more moderate "slow speed" before reaching the fog bank without affecting her steering capability (A. 33, R. Ex. 26, R. 133, pp. 9, 17) but failed to do so. For this failure to reduce speed, and resulting inability to stop before collision, the Court of Appeals held SANTA MARIA at fault for exceeding the "moderate speed" requirement of Article 16(a). It therefore modified (not "reversed") the lower court's decision, and held both vessels at fault (A. 36).

SUMMARY OF ARGUMENT

1. The Court of Appeals properly held the SANTA MARIA at fault for immoderate speed in violation of Article 16(a), 33 U.S.C. § 192. SANTA MARIA was proceeding in a narrow river channel, approaching a fog bank which she knew concealed the downcoming tug and barge. At her admitted speed of 7-8 knots (half-speed) she was unable to stop within the requirements of the Rule of Sight, which requires that a vessel not exceed the speed at which she can come to a stop within her share of the visibility in time to avoid collision with a vessel which she sees emerge from the fog, provided the other vessel's speed is also

moderate. Indeed, SANTA MARIA traversed the entire distance of visibility and was still going 3-7 knots at the time of impact.

The Rule of Sight (often called the half-distance of visibility rule) was first pronounced in decisions of this court, is generally applied as the "traditional rule" which "everybody knows," and is also the law of England. The rule has been established by the courts as a standard of "moderate speed" in frequented waters, and is a viable rule of safety to prevent collisions. The rule takes into account the "existing circumstances and conditions," as required by Article 16(a). In the present case all the circumstances and conditions, including the prior sighting of the tug on radar, required cautious speed and compliance with the rule. SANTA MARIA's immoderate speed cannot be excused by necessity to maintain steerageway, for she could have reduced to slow speed without impairing her steering capability. The rule was properly applied under the circumstances of this case.

2. The rule that in mutual fault collision cases the damages are divided equally has been the settled law of the United States for more than 100 years. It was approved by unanimous decision of this Court in 1963. It was the law of England before England adopted the Brussels Convention. It is a good rule, promotes settlements, and the American Bar Association has recommended against change.

The Brussels Convention of 1910 has been adopted

by all other leading maritime nations. It governs various matters arising from collisions, including obligations of shipowners to cargo. The Convention limits cargo's recovery to that part of its damages which is in proportion to the fault of the non-carrying vessel, and there is no recovery over against the carrying vessel. For this reason there is broad support for the Convention, although it has failed to gain Senate ratification. But support for the Convention in its entirety should not be confused with support for piecemeal adoption of only the rule dividing damages in proportion to fault. The question whether damages should be divided equally, or in proportion to fault, cannot be considered in a vacuum, but only in relation to other principles of law. Piecemeal adoption of the proportional fault rule alone would produce results frustrating the intent of Congress expressed in COGSA and the Harter Act. For these reasons the matter should be left to legislative determination.

I

SANTA MARIA'S EXCESSIVE SPEED

The Rule of Sight

"Fog is the ancient terror of mariners. Particularly in waters bearing heavy traffic, such as areas adjacent to harbors or well-traveled ocean lanes, the presence of fog vastly increases the chances of collision." *Gilmore and Black, The Law of Admiralty* (1957) 415.

Accordingly, Article 16(a) of the Inland Rules[5] provides:

> "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions." 33 U.S.C. § 192.

The Court of Appeals held SANTA MARIA's 7-8 knot speed "immoderate," applying the traditional "Rule of Sight" to the facts of the case.

The Rule of Sight was first established by decisions of this Court. Generally speaking, the rule is this: — to comply with the "moderate speed" requirement of Article 16(a), a vessel proceeding in or near a fog bank, in waters where she is likely to encounter another vessel, must reduce to such speed as will enable her, by immediately reversing her engines upon first sighting another vessel, to come to a stop before colliding with the other vessel. Thus if each vessel complies, each will be able to stop at or before the point of impact.

The "Rule of Sight" was first stated by this Court in *The Nacoochee*, 137 U.S. 330, 34 L. Ed. 687 1890). The steamer NACOOCHEE was held in fault for going at half speed, 6-7 knots, in fog on the open ocean where she knew she might encounter other vessels. This Court said:

> "She was bound, therefore, . . . to maintain only such rate of speed as would enable her to come to a standstill, by reversing her engines at

[5] The International Rule is substantially the same. 33 U.S.C. § 1077 (a).

full speed, before she should collide with a vessel which she should see through the fog." 137 U.S. at p. 339, 34 L. Ed. at p. 690.

The rule was next stated in substantially the same language in *The Umbria*:

> "The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law." *The Umbria*, 166 U.S. 404, 417, 41 L. Ed. 1053, 1061.[6]

The same rule was again stated in *The Chattahoochee*, 173 U.S. 540, 548, 43 L. Ed. 801, 805 (1899).

It is clear that the rule laid down by this Court in these early cases requires each vessel to proceed only at such speed that she can be stopped within *her share* of the distance of visibility. The requirement is that they be able to stop "*in time to avoid a collision.*" Thus two approaching vessels, suddenly coming in sight of each other in the fog, must each be able to stop within one half of the distance at which they first become visible, in order to avoid collision.

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[6] Petitioner seizes on the words "provided such approaching vessel is herself going at the moderate speed required by law" to suggest that because the district court found the tug's speed of 7 knots, reduced to 3½, was immoderate, SANTA MARIA is relieved of the duty of moderate speed (Pet. Br. 18). In other words, if both vessels are going at excessive speed, neither is at fault. This absurd suggestion answers itself. The language of course refers to avoidance of collision, not to the duty.

This is well stated in Griffin's leading American treatise on collision:

> "In *The Nacoochee*, and in *The Umbria*, . . . the Supreme Court said, not that the vessel need be able merely to stop within the visible distance, but that she must stop *'before she should collide with a vessel which she should see through the fog,'* 'provided that such approaching vessel is herself going at the moderate speed required by law.'
>
> . . . . .
>
> "The Supreme Court meant that each vessel must be able to stop before she reached the meeting point, — in other words, to restrict each vessel to her share of the visible distance. No other rule would accomplish the result." *Griffin, The American Law of Collision*, 1949, at pp. 294, 295.

As clearly pointed out in the Court of Appeals opinion, SANTA MARIA did not comply with the Rule of Sight. Not only was she unable to stop within one-half the distance to the point at which she saw the tug and barge emerge from the fog bank; indeed since the course of the tug and barge were at right angles to the course of the SANTA MARIA when first sighted, and then diagonally upriver away from the SANTA MARIA, it is clear that SANTA MARIA's momentum carried her substantially the *entire distance* of visibility. And even at the moment of collision she was not stopped but was still proceeding at 3-7 knots speed. This is virtually conceded by Petitioner (Pet. Br. 5, 22).

The Rule of Sight Is Consistent with "Regard to the Existing Circumstances and Conditions"

Petitioner's basic argument is that "moderate speed" is a relative term, and that the Court-fashioned rule of sight is inconsistent with "regard to existing circumstances and conditions," and unreasonably limits the discretion of the navigator.

Respondents agree that "moderate speed" is a relative term, and depends on regard to the existing circumstances. But the Rule of Sight is not inconsistent with this concept. Indeed the courts have often said in one breath that moderate speed is a relative term dependent on the circumstances, and then have gone on to pronounce and apply the Rule of Sight.

Thus, in *The Chattahoochee*, 173 U.S. 540, 43 L. Ed. 801 (1899), holding 7 mile speed in fog excessive, this Court said:

> "No absolute rule can be extracted from these cases. So much depends upon the density of fog and the chance of meeting other vessels in the neighborhood, that it is impossible to say what ought to be considered moderate speed under all circumstances."

immediately following which the Court stated the rule to be:

> "It has been said by this Court, in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed re-

quired by law." 173 U.S. at p. 548, 43 L. Ed. at p. 805.

Respondents do not contend that the Rule of Sight applies at all times in the open ocean where no other vessel is likely to be met. It does apply in rivers or harbors and places where other vessels should be anticipated.

The Rule of Sight obviously takes account of the particular circumstances such as positions of the vessels, weather, density of the fog, size and maneuverability of the vessels, etc. These are the very factors that enter into the ability of the vessel to stop within her share of the visibility. If visibility is a mile, obviously a vessel is permitted much greater speed than if visibility is only a hundred yards. If a strong current or headwind would help stop the vessel, that again may be considered. A twinscrew vessel may stop more quickly by extra power astern. A fully loaded vessel may have to proceed more slowly than a light vessel, due to the fact that her momentum will carry her further. What is required by the Rule of Sight is that the vessel proceed at such moderate speed that she can stop within her share of the visibility, in time to avoid collision after sighting the other vessel. Of course, all the circumstances and conditions enter into her ability to stop.

Petitioner's brief sets forth a list of the existing circumstances and conditions to be considered in determining moderate speed, and states that the Rule of Sight ignores them. (Pet. Br. 12-13.) We accept the

list, and show that nearly every one calls for extra caution under the facts of the present case:

(a) *The density of the fog and the condition of the weather for hearing fog signals;*

Here the fog bank that concealed the tug and barge were so dense that SANTA MARIA did not see them until they emerged on a right angle course some 900 feet distant. It was in the dark of night. (A. 27, 30).

(b) *Whether the vessel is in narrow waters or on the broad ocean;*

Here she was navigating in the narrow channel of the Columbia River (A. 27).

(c) *Whether on fishing grounds or in frequented or unfrequented waters;*

Much frequented waters—one of the main arteries of commerce in the Pacific Northwest.

(d) *The possibility or probability of meeting other vessels;*

Very probable — in fact SANTA MARIA knew she was meeting the tug and barge, although she could not see them.

(e) *The readiness with which a vessel (if laden or in ballast) is able to maneuver;*

SANTA MARIA was fully loaded with 17,000 tons of petroleum products, and did not, and apparently could not, maneuver to avoid collision. (Unlike the small twin screw tug which could and did maneuver quickly to turn and run.)

(f) *The quickness with which she can be brought to a standstill with the reserve of steam available for that purpose;*

SANTA MARIA, because of her size, speed and momentum, could not be brought to a standstill even in the 900 feet, but was still going 3-7 knots at the time of impact.

(g) *Her position with respect to heavy tideways, strong currents or other dangers;*

This was not a factor. There was no appreciable tide or current (Ex. 9, R. 132).

Thus every circumstance and condition but one called for extreme caution, and compliance with the Rule of Sight, at least to the point consistent with steerageway. Under all the circumstances, SANTA MARIA's unnecessary speed was immoderate.

Moderate Speed as Defined by the Courts—The Rule of Sight

Petitioner's brief makes the astonishing statement that "The Ninth Circuit Court of Appeals is the only court to adhere to the half distance rule" (Pet. Br. 15). That is simply not true. As shown above, the rule originated in this Court's decisions in *The Nacoochee*, supra, *The Umbria*, supra, and *The Chattahoochee*, supra. See also *Griffin on Collision*, (1949) 294-95.

The learned authors Gilmore and Black in *Law of Admiralty* state:

> "A rule of thumb, often applied, is that a speed is moderate if, given the conditions of visi-

bility that prevail, the vessel can come to a dead stop in one-half the distance between herself and another vessel when first sighted." citing this Court's decision in *The Umbria*, supra. *Gilmore and Black, Admiralty*, 416.

Contrary to the assertions in Petitioner's brief, the law of England likewise applies the Rule of Sight.

". . . their lordships are of opinion that it is the duty of the steamer to proceed only at such a rate of speed as will enable her, after discovering a vessel meeting her, to stop and reverse her engines in sufficient time to prevent any collision from taking place." *The Great Eastern*, Brown and Lushington Adm. 287 (cited with approval in *The Umbria*, 166 U.S. 417, 41 L. Ed. 1061.

And in *The Kincora* v. *The Oceanic*, a collision in fog in the Irish Sea, the large steamer Oceanic was held at fault for 6 1/3 knot speed. The House of Lords said:

"She was going at a speed which rendered it impossible to stop within the limit of observation." *The Oceanic*, 9 Aspinall's M.C. (N.S.) 378, 380 (H.L. 1903). See also *La Boyteaux, Rules of the Road at Sea*, 82.

In the Second Circuit, the Rule of Sight is so commonly applied that Learned Hand refers to it as a rule that "everybody knows":

"Although Article 16, 33 U.S.C.A. § 192, only requires a vessel in a fog to 'go at a moderate speed' *as everybody knows*, the courts have imposed a gloss upon this that 'moderate speed is

that at which, if the other vessel also does her duty, the vessel will be able to stop her way before they collide' " (emphasis supplied) *Anglo Saxon Petroleum Co.* v. *United States*, 222 F.2d 75, 77, rehearing 224 F.2d 86 (2 Cir. 1955).

The opinion on rehearing makes it clear the vessel was required to stop in her *share* of the visibility—less than 300 feet in visibility of approximately 500 feet, and further says of the requirement of moderate speed: *"the command is imperative,"* and is not excused by necessity to maintain steerageway, 224 F.2d 86, 87.

Many other cases in the Second Circuit adhere to the Rule of Sight or an even stricter rule.[7]

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[7] *Skibs A/S Siljestad* v. *S/S Mathew Luckenbach*, 215 F. Supp. 667 (S.D. N.Y. 1963) aff'd 324 F2d 563; *Villain & Fassio E Compagnia* v. *The Tank Steamer E. W. Sinclair*, 207 F. Supp. 700 (S.D. N.Y. 1962), aff'd 313 F.2d 722; *Afran Transport Co.* v. *The Bergechief*, 170 F. Supp. 893, 899; 274 F.2d 469, 473 (2nd Cir. 1960); *Polarus S.S. Co.* v. *T/S Sandefjord*, 236 F.2d 270 (2 Cir. 1956); *The William H. Taylor*, 278 F. 717 (2 Cir. 1922); *The Manchioneal*, 243 F. 801 (2 Cir. 1917); *The Bayonne*, 213 F. 216 (2 Cir. 1914); *Holland-America Line* v. *M/V Johs. Stove*, 286 F. Supp. 69 (S.D. N.Y. 1968); *Oil Transfer Corp.* v. *Westchester Ferry Corp.*, 173 F. Supp. 637 (S.D. N.Y. 1958).

In *Polarus*, as in many cases, the court stated that "moderate speed" is a relative term, depending on the circumstances, and then went on to say that the purpose of the statute is spelled out in the "sight rule." Under the particular facts, the Polarusoil was able to stop dead in the water before the collision, and so was exonerated. 236 F.2d 270, 271-72.

Skibs A/S Siljestad, supra, suggests an even stricter rule. After stating "some courts have applied the Rule of Sight, viz., to be able to stop within the vessel's share of the visibility," the opinion proceeds, "perhaps, too, the decisional

Likewise the Third Circuit: *The Bohemian Club*, 134 F.2d 1000, 1002-3 (1943), and the Fourth Circuit: *City of Norfolk*, 266 F. 641, cert. den. 253 U.S. 491, 64 L. Ed. 1028 (1920).

Also the Fifth Circuit: *O/Y Finlayson-Forssa* v. *Pan Atlantic S.S. Corp.*, 259 F.2d 11 (5 Cir. 1958), cert. den. 361 U.S. 882, 4 L. Ed. 2d 119 (1959). In that case, Judge John R. Brown, an experienced admiralty practitioner, said:

> "Without a doubt the circumstances called for the application of the traditional rule of sight by which the vessel must proceed at a rate of speed which will allow her to come to a stop within one-half limit of visibility. *The Tug Percheron*, 5 Cir., 246 F.2d 135, 1957 A.M.C. 1941; *The Nacoochee*, 137 U.S. 330, 339, 34 L. Ed. 687, 690; *The Umbria*, 166 U.S. 404, 417, 41 L. Ed. 1053, 1060; *Griffin on Collision*, pp. 288-296.
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> ". . . the Antinuous had to demonstrate that . . . she could stop before she traversed one-half the distance she could see. *A. H. Bull SS Co.* v. *United*

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law in this circuit is even stricter than either the bare steerageway rule or the rule of sight," 215 F. Supp. 667, 679.

In *Afran Transport Co., supra*, The Bergechief was condemned even for maintaining bare steerageway. 170 F. Supp. 893, 899.

In *Oil Transfer Corp., supra*, Judge Learned Hand states "It is quite true that the *generally accepted rule* is that a vessel may travel in a fog at a speed that will allow her to stop within the distance of the existing visibility if she meets another vessel who can also stop within that distance. That would of course mean half the distance of the visibility if the meeting vessel was moving at the same speed, . . ." 173 F. Supp. at 639).

States, 2 Cir., 34 F.2d 614, 1929 A.M.C. 1175; *The Lillian Anne-Pennsylvania*, 2 Cir., 1934 A.M.C. 569, cert. den.; *Chesapeake & Delaware Steamboat Company* v. *The Tug Pennsylvania*, 293 U.S. 575, 55 S. Ct. 86, 79 L. Ed. 673, 1934 A.M.C. 1410; *The Goldshell-White Plains*. 2 Cir., 224 F.2d 86, 1955 A.M.C. 1438; *Marsden's Collisions at Sea*, 10th Ed. 1953, pp. 479-480." 259 F.2d 20-21, cert. den. 361 U.S. 882, 4 L. Ed. 2d 119 (1959).

A recent administrative decision from the Coast Guard, which presumably has some expertise in matters of navigation, states: "The old and established rule that in conditions such as existed here, the speed should be reduced to that in which the ship's forward motion could be stopped within half the distance of visibility still is appropriate." *Dewey Soriano—License*, 1969 A.M.C. 2141, 2158.

. . . . .

Discretion of the Navigator Must Be Exercised Within the Standards of the Rule of Sight

Petitioner asks that the Rule of Sight be scrapped, leaving it solely to the discretion of the navigator to determine what is moderate speed under the circumstances. Nothing could be more conducive to collisions.

The Rule of Sight is a rule of safety. Speed is the greatest cause of collision, and the rule places a limitation on speed. In effect, the rule sets a minimum standard. The vessel's speed must be moderate, and when she is navigating in restricted waters where it

is probable she will meet other vessels, her speed must be reduced at least to the point where she can stop within her share of visibility. And this still depends upon all of the factors and circumstances that control the ability of the vessel to stop within her share of the visibility. No complicated calculations are required. For a navigator familiar with the weather and the stopping capability of his vessel, as he should be, it should be no more difficult to obey the rule of visibility than for a person driving on a highway to drive at such speed that he can stop in case the car ahead should make a sudden stop.

"Discretion" should be no license to violate the rule. As said by the First Circuit Court of Appeals, in *The Sagamore*, 247 F. 743 (1917):

> "The discretion of the navigator in the matter of speed in a fog must be exercised not wholly as a matter of individual judgment or of individual views as to what is moderate speed, but also with due regard to the interpretation of the term 'moderate speed' by the maritime courts and to the general standards of good seamanship established by those courts in applying the term 'moderate speed.'" 247 F. 743, 749. See also *Griffin on Collision* (1949) 299; *La Boyteaux, Rules of the Road at Sea*, pp. 80-81.

In this connection, the words of Learned Hand, quoted in the opinion below (A. 36) are worth repeating:

> "The fact that the rule (Rule of Sight) is more honored in the breach than in the observance merely means that people are usually willing to

take chances rather than submit to the galling necessity of poking about in a fog; and, although the usual measure of the care demanded is that commonly used in the calling, that is not the inevitable standard. Common prudence is not always adequate prudence; the courts may and at times do condemn practices that are current in the business." *Anglo-Saxon Petroleum Co.* v. *United States*, 222 F.2d 75, 78 (2d Cir. 1955).

Radar

Petitioner suggests that SANTA MARIA's radar sighting of the tug is a circumstance which relieves it from the Rule of Sight (Pet. Br. 13-14). This is contrary to the Radar Annex, the decisional law, and good sense.

It is common knowledge that radar, while a valuable aid, is no safeguard against collision.[8] Undue reliance on radar often brings about "radar-assisted" collisions that might not have occurred without radar. See *Moscow, Collision Course* (*The Andrea Doria—Stockholm Collision*), Putnam, N.Y. 1959; *Polarus S.S. Co.* v. *T. S. Sandefjord*, 236 F.2d 270, 271 (2 Cir. 1956); *Ove Skou Rederi A/S* v. *Nippon Yusen Kaisha*, 1971 A.M.C. 470, 472 (Supreme Ct. of Canada); *Skibs A/S Siljestad* v. *S. S. Mathew Luckenbach*, 215 F. Supp. 667, 679-80 (S.D. N.Y. 1963).

Petitioner's citation of the Radar Annex (Pet. Br. 13) fails to include the most significant portion:

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[8] Radar tells only of the presence of another vessel, but unless plotting is done (and SANTA MARIA did no plotting) it does not indicate course or speed or changes of course of the other vessel.

> "Radar indications of one or more vessels in the vicinity may mean that 'moderate speed' *should be slower* than a mariner without radar might consider moderate in the circumstances" (emphasis supplied) 33 U.S.C.A. § 1094(2) (1963).

Since Congress had "moderate speed" under consideration when adopting the Radar Annex in 1963, and the courts have for many years enforced the Rule of Sight as a standard of moderate speed, the above language implies legislative approval of the rule.

The courts have uniformly held that radar-equipped vessels, which have sighted the other vessel on radar, are bound by the rule of visibility. *O/Y Finlayson-Forssa* v. *Pan Atlantic Steamship Corp.*, 259 F.2d 11 (5th Cir. 1958); *Norscott Shipping Co.* v. *Steamship President Harrison*, 308 F. Supp. 1100 (E. D. Pa. 1970); *Holland-America Line* v. *Motor Vessel Johs. Stove*, 286 F. Supp. 69 (S.D. N.Y. 1968); *United States* v. *Motor Ship Hoyanger*, 265 F. Supp. 730 (W.D. Wash. 1967); *Skibs A/S Siljestad* v. *Steamship Mathew Luckenbach*, 215 F. Supp. 667 (S.D. N.Y. 1963); *Weyerhaeuser Steamship Co.* v. *United States*, 174 F. Supp. 663 (N.D. Cal. 1959). All of these decisions invoke the half-distance rule. *Wood, et al* v. *United States*, 125 F. Supp. 42 (S.D. N.Y. 1954). See also *Meadows, Radar Annex and Rule 16*, 5 Willamette L.J. (1969) 399, 403 and many cases cited in note 12.

Steerageway

While all courts recognize the Rule of Sight as the general rule, some have qualified it by saying a vessel must reduce to the slowest speed consistent with maintaining steerageway.

Most decisions have rejected the steerageway excuse. *The Pennsylvania*, 86 U.S. 125, 134, 22 L. Ed. 148, 151 (1874); *Anglo-Saxon Petroleum Co.* v. *U. S.* (rehearing), 224 F.2d 86 (2 Cir. 1955); *Afran Transport Co.* v. *The Bergechief*, 170 F. Supp. 893, 899 (S.D. N.Y. 1959); *Holland-America Line* v. *M. V. Johs. Stove*, 286 F. Supp. 69, 72 (S.D. N.Y. 1968). *United States* v. *M. S. Hoyanger*, 265 F. Supp. 730, 734 (W.D. Wash. 1967).

Other decisions, however, have indicated that it is permissible to maintain the minimum speed requisite to maintain steerageway. ". . . it is not unreasonable to require that she reduce her speed to the lowest point consistent with a good steerageway, which the court finds in this case to be three miles an hour." *The Martello*, 153 U.S. 64, 70, 38 L. Ed. 637, 640 (1894); See also *The Sagamore*, 247 F. 743, 748 (1st Cir. 1917); *Hess Shipping Corp.* v. *S.S. Charles Lykes*, 417 F.2d 346 (5 Cir. 1969), reh. en banc 424 F.2d 633, cert. den. 400 U.S. 853, reh. den. 400 U.S. 931.*

* The *Hess* case recognizes the Rule of Sight, but by 7 to 7 divided opinion on rehearing, allowed a speed as moderate where any further reduction would have seriously impaired control of the vessel. Judge John R. Brown vigorously dissented. 417 F.2d 351.

In any event, the steerageway excuse is not available to SANTA MARIA under the facts of the case. She was proceeding at half speed. She could, and should, have reduced to slow speed without impairing her steering.[10] As the Court of Appeals said, "But we have no evidence that the SANTA MARIA could not be safely navigated at less than seven to eight knots." (A. 33).

II

DIVISION OF DAMAGES—EQUAL OR PROPORTIONAL

It has been the established admiralty rule in the United States, for more than 100 years, that in mutual fault collision cases the damages are shared equally.[11]

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[10] SANTA MARIA's helmsman, with 22 years experience, testified his vessel 'steered good', and steered just as well at slow speed as at half or full speed:

"Q. Is it more difficult to hold an exact course when you are going at slow speed?

A. I don't find it so, no. If you give it enough wheel, she will hold her course real good.

* * * * *

Q. Now, does it make any difference whether you are going full speed, half speed or slow speed and fully loaded?

A. Not if you give it enough wheel it doesn't make and difference...." (Ex. 26, R. 133, p. 17).

The pilot testified, 'You can't slow a loaded ship, any ship, tanker or otherwise, from a full ahead to a slow bell without losing your steering. You have to reduce it slowly. But after you once get the speed off, they handle very good.' (A. 33, note 5).

[11] *Schooner Catherine* v. *Dickinson*, 58 U.S. (17 How.) 170, 15 L. Ed. 233 (1855); *Phoenix Ins. Co.* v. *The Atlas*, 93 U.S. 302, 319, 23 L. Ed. 863, 868 (1876); *Halycon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 284, 96 L. Ed. 318, 319 (1952); *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 603, 10 L. Ed. 2d 1, 6 (1963).

Accordingly the Court of Appeals, having found SANTA MARIA at fault for immoderate speed, ordered that the judgment of the district court "be modified to hold both vessels at fault, and the damages divided" (A. 36).

Petitioner asks that this Court, by judicial decision, scrap the equal division rule and adopt in its place a rule dividing damages in proportion to the degree of fault.

Seeking sympathy for its position, petitioner suggests that the tug's fault was more flagrant and shocking than that of SANTA MARIA, and that SANTA MARIA's fault may not even have contributed to the collision.

The principal fault of the tug was her U-turn, which was an in extremis maneuver to escape and run away from the tanker after sighting its lights ahead in the fog at close range. The tug's speed was less than that of SANTA MARIA and she was a far more maneuverable vessel.

SANTA MARIA's violation of the moderate speed requirement of Article 16 was a most serious fault, and no mere technical violation.[12]

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[12] Petitioner's reliance upon the district court's statement that fault of the SANTA MARIA was a "possible technical violation" (Pet. Br. 24) is misplaced. The district court was there referring to the tug's contention, pressed vigorously at the trial, that SANTA MARIA had violated the *second part of Article 16* requiring a vessel to *stop engines* on hearing a fog signal ahead. This is evident from the context, and the cases cited. That contention was dropped on the appeal. It has nothing to do with the rule of sight under the "moderate speed" requirement of the first part of Article 16, which was wholly overlooked or ignored by the trial court.

Considering that speed in fog is one of the greatest causes of collision, that SANTA MARIA knew the tug and barge were approaching but concealed by the fog, and that, in the words of Learned Hand the "command is imperative" for moderate speed, it is indeed doubtful whether the fault of the SANTA MARIA was any less than that of the tug.

It is obvious from any analysis of the facts that SANTA MARIA's immoderate 7-8 knot speed was a contributing cause of the collision. Had she been able to stop within her share of the visibility, or even within the entire distance of visibility, there would have been no collision.

In any event, it is well settled that SANTA MARIA's violation of the moderate speed requirement of Article 16 casts upon her the burden of the rule of *The Pennsylvania*, to prove not only that her speed *did not* contribute, but that it *could not have* contributed to the collision.[13] SANTA MARIA cannot possibly meet this burden.

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[13] *The Pennsylvania*, 86 U.S. 125, 22 L. Ed. 148 (1874); *Yang-Tsze Ins. Ass'n* v. *Furness, Withy & Co.*, 215 F. 859 (2d Cir. 1914), cert. dismissed 242 U.S. 430, 37 S. Ct. 141 (1917); *Eastern S.S. Co.* v. *International Harvester Co. of N. J.*, 189 F.2d 472, 476, 1951; *Boyer* v. *The Merry Queen*, 202 F.2d 575, 1953 A.M.C. 482 (3d Cir. 1953); *O/Y Finlayson-Forssa* v. *Pan Atlantic Steamship Corp.*, 259 F.2d 11 (5 Cir. 1958); *The Silver Palm*, 94 F.2d 754 (9 Cir. 1938); See also Gilmore & Black, Law of Admiralty, 404-405.

"Where a vessel violates this statute (Article 16) by proceeding through fog at an immoderate speed, her only chance to extricate herself from liability resulting from her collision with another vessel is not to show that the other vessel was guilty of a more flagrant fault but rather to show that such statutory fault not only did not cause, but could not possibly have caused the collision in question." *Norscott Shipping Co.* v. *Steamship President Harrison*, 308 F. Supp. 1100, 1105 (E.D. P.A. 1970).

Divided Damages vs. Proportional Fault

In 1952 this Court refered to the United States rule of equal division of damages as "established admiralty doctrine."

> "Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties. This maritime rule is of ancient origin and has been applied in many cases. . . ." *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 284, 96 L. Ed. 318, 319 (1952).[14]

Again, in 1963, in *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 603, 10 L. Ed. 1, 6, a unanimous court approved the divided damages rule as follows:

> "There is involved here, instead, a rule of admiralty law which, for more than 100 years, has governed with at least equal clarity the correlative rights and duties of two shipowners whose vessels have been involved in a collision in which both were at fault. *The Catharine* v. *Dickinson*, U.S. 17 How. 170, 177, 15 L. Ed. 233, 235; *The North Star (Reynolds* v. *Vanderbilt)*, 106 US 17, 21, 27 L. Ed. 91, 93, 1 S. Ct. 41. See *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 284, 96 L. Ed. 318, 319, 72 S. Ct. 277."

The law of England also adhered to the equal di-

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[14] *Halcyon* was followed as authority for the Per Curiam decision May 15, 1972 in *Atlantic Coast Line R.R. Co.* v. *Erie Lakawanna R.R. Co.*, No. 71-107, — U.S. —.

vision of damages rule until it was changed by legislation through adoption of the Brussels Convention of 1910.[15]

In 1962 a bill (S. 2313) to provide for proportional fault in collision cases was before the Senate. In the face of objections by interested groups, it was indefinitely postponed by unanimous consent.[16]

The American Bar Association is on record as opposed to changing the present rule of divided damages:

> "Be it Resolved, by this Association that as the present maritime law of the United States relative to division of damages in collision cases has operated satisfactorily for a long number of years, no change in such law should be approved by this Association." 1928, 17 Cornell L.Q. 348.

Petitioner has misconstrued support for adoption of the Brussels Convention of 1910 (discussed infra), as support for change in the divided damages rule. While it is true there is considerable support for the Brussels Convention in toto, there has been no pressure by steamship companies, marine insurance companies, or shipping interests, seeking to change the divided damages rule. On the contrary, we believe American marine insurance companies (whom we agree are the interested parties in most collision

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[15] *Hay* v. *Leneve*, 2 Shaw's Reports, 395; *Marsden's Collisions at Sea*, 6th Ed. 1910, pp. 123, 124. See also 17 Cornell L.Q. 343.

[16] Congressional Record 87th Cong. 2d Session, Vol. 108, part 16 p. 21249.

cases)[17] prefer the present 50-50 rule as one that clearly promotes settlements.

In most collision cases, upon its being apparent that both vessels are at fault, settlements are quickly reached with great savings in the expense and delays of prolonged litigation. Two vessel owners, or their underwriters, can readily agree that both vessels were at fault. But they can seldom agree which vessel was more at fault;—that can be as difficult as the parties to a divorce case arguing which was more at fault.

With respect to the added burden that would be imposed on the courts by a rule of proportional fault, note should be taken of the difference in practice between England and the United States. Most, if not all, collision cases in England are litigated in special admiralty courts, — the Admiralty Division of the High Court of Justice. The judges are assisted by the elder brethren,[18] nautical experts who are usually retired shipmasters, with whom the judges may consult as to the assessment of degrees of fault. With such assistance, the task of apportioning fault in a collision case may be somewhat easier for an English court than for our overworked American judges.

Brussels Convention of 1910

It is quite true that all leading maritime nations of the world, except the United States, have adopted the Brussels Collision Convention of 1910.

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[17] Pet. Br. 33.

[18] 13 Cornell L.Q. 548.

The Brussels Convention does far more than provide for proportional, rather than equal, division of damages in mutual fault collisions.[19] It also governs liabilities of the vessel owners for damages to cargo. Article 4, See Pet. Br. 40.

By Article 6, all legal presumptions of fault in collision cases are abolished.

The Brussels Convention was submitted to the United States Senate in 1937. Extensive hearings were held, but it was never ratified. After 10 years, in 1947, it was withdrawn by the President.[20]

One of the most important provisions of the Brussels Convention is that which affects the rights of cargo. In large ship collision cases there is often extensive loss and damage to cargo. This is particularly true when a vessel is sunk.

Under the Carriage of Goods by Sea Act (1936) of the United States, and similar laws of other maritime nations, the owner of a vessel on which cargo is carried is not responsible for damage to that cargo caused by fault or negligence of the master or crew in the navigation of the vessel. 46 U.S.C.A. § 1304(2)(a). This has long been the legislative policy of the United States. The Harter Act contains substantially the same provision. 46 U.S.C. § 192. Therefore, in a

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[19] The full text of the Convention, together with history of adherences, is set forth in *Bendict on Admiralty*, 7th Ed. Vol. 6, 38-42.

[20] See *Benedict on Admiralty*, 7th Ed. Vol. 6, p. 38; also Senate Report 1603, 87th Congress, 2d Session.

collision case cargo cannot recover against the carrying vessel.

However, under United States law, cargo can recover in full against the other "non-carrying" vessel if it is in part to blame. The non-carrying vessel is liable for 100% of the cargo damage, even though its share of the blame may be small. The non-carrying vessel is entitled to include its liability for cargo damages in its claim against the carrying vessel. And under the American law of equal division of damages in mutual fault collisions, the non-carrying vessel recovers back from the carrying vessel one-half of the damage to cargo on the carrying vessel. *The Chattahoochee*; 173 U.S. 540, 43 L. Ed. 801 (1899); *United States of America* v. *Atlantic Mutual Insurance Co. et al*, 343 U.S. 236, 96 L. Ed. 907 (1952). Thus, while the carrying vessel is exempt, under COGSA or the Harter Act, from a direct liability for damage to its cargo, it is subject to liability for 50% of such damage through application of the equal division of damages rule. For a full discussion of these principles, see *Gilmore and Black, Admiralty*, 152 et seq.

This is completely changed by Brussels Convention of 1910. Cargo is still precluded from recovery against its carrying vessel under the provisions of COGSA or the Harter Act. But cargo can recover against the non-carrying vessel only in proportion to that vessel's fault. Thus if the non-carrying vessel's share of the blame is only one-third, cargo can only recover one-third of its damages. And since the amount of the non-carrying vessel's liability is lim-

ited to its proportion of fault, no part of this cargo damage is charged back against the carrying vessel. Under Brussels Convention the carrying vessel has no liability, direct or indirect, for loss or damage to its cargo.

It is for this reason that American shipowners enthusiastically support adoption of Brussels Convention. And likewise the United States Government, which through the Maritime Commission, is one of the world's largest shipowners. See 64 Yale L. J. 882, 890.

It is this kind of support for Brussels Convention in its entirety that petitioner has misconstrued as support for changing the divided damages rule alone (Pet. Br. 31-33).

To adopt piecemeal the isolated provision for division of damages between the shipowners on the basis of proportional fault, without adopting the rest of the Brussels Convention, would produce results contrary to the intent of Congress and which we believe shipowners and the Maritime Commission would most strongly oppose.

Thus, suppose a collision in which the fault of the cargo carrying vessel is 90% and the non-carrying vessel 10%. Under settled United States law, cargo would recover 100% of its damages against the non-carrying vessel. But then, under a rule of proportional fault, the non-carrying vessel would recover 90% of these cargo damages back from the carrying vessel.

Such a result, going far beyond *The Chattahoo-*

chee, would frustrate the intent of Congress, expressed in the Harter Act and COGSA, to relieve the carrying vessel from liability for damage to its cargo caused by its negligent navigation.[21]

One of the chief reasons for support of the Brussels Convention is to achieve uniformity with other maritime nations. But this requires adoption of the Convention in its entirety. As can be seen from the example given, the result of piecemeal adoption of proportional fault would, in respect to liability for cargo damage, push United States law even further away from uniformity with that of other nations.

Consider also the retroactive results of the Court changing the rule by judicial decision. We agree with petitioners that shipowners do not have collisions in reliance upon the law of equal division of damages rather than proportional fault. However, millions of tons of cargo have been shipped, and premiums for cargo insurance, and P&I and collision insurance for the vessels have been paid in reliance on the law as it stands.

For these reasons, the question of divided damages versus proportional fault cannot be considered in a vacuum. Any change should be accomplished either by legislation, or by ratification of the Brussels Convention, so that all related aspects of maritime law may be taken into account.[22] If shipowners, insur-

[21] The absurdity of this result is that the carrying vessel, if 90% at fault, would bear 90% of the damages to its own cargo, but if 100% at fault, would have no liability for damage to its cargo.

ance companies, and cargo owners, are really united in a desire for a change in the rules, this can be accomplished in Congress.

For these reasons we suggest that the words of this Court in *Halcyon, supra*, and again in *U. S.* v. *Atlantic Mut. Ins. Co., supra*, are most appropriate to the present problem:

> "We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await Congressional action. . . . A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made. The record before us is silent as to the wishes of employees, carriers, and shippers; it only shows that the *Halcyon Line* is in favor of such a change in order to relieve itself of a part of its burden in this particular lawsuit." *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285-286, 96 L. Ed. 318, 320-321 (1952).
>
> "Here, once more, 'we think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests' of the varied groups who would be affected. . . ." *United States* v. *Atlantic Mut. Ins. Co.*, 343 U.S. 236, 242, 96 L. Ed. 907, 914 (1952).

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[22] Other principles of collision law that should be taken into account in any change of the rule as to division of damages, are the major-minor fault rule of the *Victory and the Plymothian*, 168 U.S. 410, 423, 42 L. Ed. 519, 528 (1897). See *Griffin on Collision* § 224; and the presumption under the rule of *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 136, 22 L. Ed. 148, 151 (1874), that any statutory fault is presumed to have been a contributing cause of the collision, which would be abolished by Article 6 of the Brussels Convention.

CONCLUSION

1. For the reasons stated, SANTA MARIA's 7-8 knot speed, approaching a fog bank in a narrow channel where she knew the tug was approaching, at which speed she not only could not stop, but was still going 3 to 7 knots at the time of collision, and which speed was not needed in order to maintain steerageway, was clearly immoderate and contributed to the collision.

2. The United States rule of equal division of damages in mutual fault collision cases, approved by a unanimous court in *U. S.* v. *Weyerhaeuser* in 1963, should not be changed; but if it is to be changed, this should not be done piecemeal, but only by legislation where other related rights and principles may be considered.

The well-reasoned decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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June 8, 1972

SUPPLEMENTARY/REPLY BRIEF FOR THE PETITIONER

In the Supreme Court
of the United States

OCTOBER TERM 1971

No. 71-900

UNION OIL COMPANY OF CALIFORNIA,
a corporation,

Petitioner,

v.

The Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III, their engines, boilers, tackle, apparel and furniture; and STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondents.

SUPPLEMENTARY/REPLY BRIEF FOR THE PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I

Since submisison of the Brief for Petitioner it has come to petitioner's attention that an international conference will be convened in October, 1972 to consider revision of the International Regulations for Preventing Collisions at Sea, including Article 16, the speed-in-fog rule. The convening body, the Inter-Governmental Maritime Consultative Organization (IMCO), an agency of the United Nations, has directed its Maritime Safety Committee to prepare a draft

convention to be used as a working paper at the conference. See Department of Transportation, U. S. Coast Guard, 29 Proceedings of the Maritime Safety Council 70 (Apr. 1972). Petitioner has obtained a copy of this draft (IMCO, MSC XXV/3(b)/1, 10 Feb. 1972) and believes that its provisions relating to speed in reduced visibility should be considered by the court as reflecting the latest authoritative thinking on the subject. (A copy of the draft has been made available to Respondent.) We believe that the proposed regulations make it unmistakably clear that the half-distance rule is not sanctioned by international maritime authorities as a rule of law.

Under the proposed convention, Article 16 would be replaced by Rules 25 and 26:

> Rule 25 — All vessels
>
> (a) Every vessel shall proceed at a safe speed adapted to the existing circumstances and reduced visibility conditions. A power-driven vessel shall have her engines ready for immediate manoeuvre.
>
> (b) Except where it has been determined that a risk of collision does not exist, a power-driven vessel hearing, apparently forward of her beam, the fog signal of another vessel shall immediately, so far as the circumstances of the case admit, reduce her speed to bare steerageway and, if necessary, take all her way off and then navigate with caution until danger of collision is over.
>
> Rule 26 — Vessels with operational radar
>
> (a) Any vessel which detects by radar the

presence of another vessel, prior to hearing her fog signal, and has determined that a close quarters situation is developing and/or risk of collision exists, shall, if the circumstances of the case admit and as early as practicable, avoid such a situation by alteration of course and/or speed or by stopping or reversing her means of propulsion:

(i) if course is altered to avoid a vessel forward of the beam an alteration of course to port shall, so far as possible, be avoided, unless the other vessel is being overtaken;

(ii) if course is altered to avoid a vessel abeam or abaft the beam an alteration of course towards the direction of the other vessel shall, so far as possible, be avoided.

(b) If a close quarters situation involving risk of collision cannot be avoided the vessel shall immediately, so far as the circumstances of the case admit, reduce her speed to bare steerageway and if necessary take all her way off and then navigate with caution until risk of collision is over.

It is obvious that these rules eschew a rigid, mechanical approach such as the half-distance rule, and are instead keyed to the sound judgment of the captain. The distinction between vessels with operational radar and those without is not made by the half-distance rule. The "safe speed" standard in Rule 25 is defined by Rule 5 (b):

The term 'safe speed' means a speed at which the vessel can take proper and effective action at any time to avoid collision and can be stopped

within a distance appropriate in the prevailing circumstances and conditions.

Rule 7 details the "circumstances and conditions" which *shall* be taken into account:

Rule 7 — Safe speed

Every vessel shall at all times proceed at a safe speed. In determining safe speed the following factors shall be taken into account:

(a) For all vessels:

(i) the state of the visibility;

(ii) the prevailing state of wind, sea and current;

(iii) the traffic density including concentrations of fishing vessels or any other vessels;

(iv) the proximity of navigational hazards;

(v) the manoeuvrability with special reference to stopping distance and turning ability in the prevailing conditions.

(b) For vessels with operational radar:

(i) the characteristics, efficiency and limitations of the radar;

(ii) the proper use of radar to assess risk of collision;

(iii) the effect of the state of the sea and weather and other sources of interference on radar detection;

(iv) the possibility that small ves-

sels, ice and other floating objects may not be detected by radar at an adequate range;

(v) that radar indications of one or more vessels in the vicinity, in conditions of restricted visibility, may mean that 'safe speed' should be slower than a mariner without radar might consider safe in the circumstances;

(vi) any constraints imposed by the radar range scale used.

Rule 26 operates only when the captain "has determined that a close quarters situation is developing and/or risk of collision exists. . . ." Even then, precautionary action is directed "if the circumstances of the case admit. . . ." Finally, the prescribed action is not a slowing to half-speed or any other speed but an "alteration of course and/or speed," presumably including even an increase in speed.

Petitioner believes that these proposals thoroughly repudiate rigid standards such as the half-distance rule and support the comprehensive and objective approach directed by Congress under Article 16. If the proposed rules were applied in the present case they would vindicate the judgment and conduct of the Santa Maria's pilot.

II

Respondent raises three objections to the comparative fault rule: (1) the mutual fault rule promotes settlements; (2) the comparative fault rule would

frustrate the intent of Congress, expressed in the Harter Act and COGSA, to relieve the carrying vessel from liability for cargo damage; and (3) any change in the rule should be made by Congress so that "all related aspects of maritime law" would be considered. None of these contentions has merit.

(1) The comparative fault rule would actually be a greater inducement to settle cases than the mutual fault rule. Under mutual fault vessels are encouraged to settle on a 50-50 basis only when relative fault is either roughly equal or impossible to determine. Since the comparative fault rule would also dictate a 50-50 division in these situations, its effect on settlements, to that extent, is no different. Where there is a clear disparity of fault, however, or fault on one side as in the present case, the less culpable (or innocent) party is inclined to take its chances on exoneration (as petitioner has done) rather than divide damages, particularly in view of the *City of New York* rule. Under comparative fault the parties (more accurately, their insurers) would be induced to negotiate a *pro rata* settlement.

(2) Petitioner urges adoption of the rule stated in the first paragraph of Article 4 of the Brussels convention (Br. for Petitioner at 40), which is a discrete provision of the convention applying only to apportionment of damages and having no effect on cargo. This rule would no more run counter to the purpose of the Harter Act and COGSA than the present mutual fault rule which allows 50% of the cargo

loss to be borne by the carrying vessel despite the immunity granted it by the Acts. Since Congress has not expressed its disapproval of this situation it is unreasonable to suppose that it would now do so simply because carrying vessels would be exposed to more than 50% liability. To the contrary, in cases where the carrying vessel is less than 50% at fault the comparative fault rule would be more in line with congressional intent than the mutual fault rule, since the carrying vessel's liability would be less than 50%.

(3) Respondent contends that congressional action is preferable to court action "so that all related aspects of maritime law may be taken into account." (Br. for Respondent at 32). The two "aspects" expressly referred to by respondent are rules adopted by this Court, namely, the major-minor fault (*City of New York*) rule and the *Pennsylvania* rule. *Id.* at 32 n. 22. It should be obvious that the comparative fault rule simply would overrule the former, which has fallen into disrepute anyway, and have no effect on the latter.

The only other aspect alluded to by respondent is the preference of the maritime industry for one rule or the other. Petitioner has shown that no segment of the industry is opposed to comparative fault, while some are openly in favor of it. Respondent merely surmises that some segments of the industry *might* oppose the rule, without offering any evidence to support this claim.

It is important to observe that the only virtue of

mutual fault asserted by respondent is its supposed role as a catalyst of settlements. As this assertion is untenable, the mutual fault rule is left wholly unsupported by principle.

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Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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SUPPLEMENTAL BRIEF OF RESPONDENTS

ON WRIT OF CERTIORARI
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I

Petitioner has recently filed a "Supplementary Reply Brief for the Petitioner" which raises entirely new matter: the draft text for proposed revision of the International Rules of the Road. Therefore, it seems appropriate for respondents to comment briefly upon this draft.

1. The new material referred to in petitioner's brief is merely a draft, or working paper, prepared by a subcommittee, of the Martime Safety Committee, of the Intergovernmental Maritime Consultive Organization. Before proposed revisions can have any validity or binding effect on United States vessels, the following procedures would have to be accomplished:

(a) Approval of the Subcommittee's draft by the Maritime Safety Committee; (b) Approval of the Maritime Safety Committee's action by I.M.C.O.; (c) Ratification by nations owning 75% of the world's seagoing tonnage; (d) Passage of a period of 12 months after such ratification; (e) State Department recommendation of the convention to the President; (f) Ratification with the advice and consent of the United States Senate.[1]

2. Certainly this draft text of revision is not material to the present collision which occurred 5 years ago (1967) upon inland waters of the United States. The present case is governed by the Congressionally enacted Article 16a of the Inland Rules (33 U.S.C. § 192) which has long been in force and still is, together with the well established judicial interpretations of Article 16a.

3. But, most important, if the draft text revisions are finally adopted, they will reinforce the "half-

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[1] See proceedings of the Marine Safety Council, April, 1972, Department of Transportation, Vol. 29, No. 4, pp. 70-71.

distance rule" as a standard of speed for vessels meeting in a close quarter situation in fog.

Respondent's brief states that "these proposals thoroughly repudiate rigid standards such as the half-distance rule . . . ." Pet. Supp. Br., p. 5. This is completely untrue.

On the contrary, the language of the proposed revisions sets stricter standards for reduced speed in fog than under the present Article 16a.

Under Article 16a, every vessel in restricted visibility is required to go at a *moderate speed.* 33 U.S.C. § 192. Proposed revision, Rule 25, requires every vessel in restricted visibility to proceed at a *safe speed.* "Safe speed" is stricter and more definite than "moderate speed."

Furthermore, the proposed text defines "safe speed" as "a speed at which the vessel can take proper and effective action at any time to avoid collision and *can be stopped within a distance appropriate* in the prevailing circumstances and conditions." Rule 5(b). The words "can be stopped" are not included in the present rules, but the courts by judicial interpretatin have imposed the requirement that the vessel *can be stopped* before colliding with another vessel which comes into sight (the half-distance rule). Thus, the text of the proposed revisions, by including the specific language "can be stopped" is practically a codification of the half-distance rule that now exists through interpretation. Undoubtedly the words "appropriate distance" would still have to be interpreted

by the courts, but it seems reasonable to assume they would continue to apply the well established rule, so many times announced by this Court, and the English courts, that the vessel must be able to stop "before colliding with another vessel which comes into sight." See Resp. Br. pp. 8-18.

4. It may also be noted that draft text Rule 26(b) requires any vessel meeting another in a close quarter situation (and obviously vessels meeting to pass in a narrow channel are in a close quarter situation) shall "reduce her speed to bare steerageway and if necessary take all her way off." As stated in the Court of Appeals decision, and as pointed out in respondent's principal brief, p. 22-23, SANTA MARIA did not reduce her speed to bare steerageway.

II

Flood v. *Kuhn*, — U.S. —, 32 L. Ed. 2d 728 (June 19, 1972), decided since the printing of Respondents' Brief, supports respondents' position that, if there is to be any change in the long established rule of equal division of damages, it should only be accomplished by legislation. (See Resp. Br. pp. 26-33).

Respectfully submitted,

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October 4, 1972

I hereby certify that I served the foregoing .....

..... on .....,

attorney for .....on the .....day of

....., 19....., by mailing to him three true and correct copies thereof, certified by me as such. I further certify that said copies were placed

in a sealed envelope addressed to the said attorney at .....

.....

which is his regular office address, or his address as last given by him on a document which he has filed in the within entitled cause and served on me; said sealed envelope was then deposited in the United States post office at

....., Oregon, on the day last above mentioned, with the postage thereon fully paid.

.....

Attorney..... for

Service of the within .....

is hereby accepted in .....,Oregon, this

.....day of....., 19.....,

by receiving three copies thereof.

.....

Attorney..... for .....

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNION OIL CO. OF CALIFORNIA *v.* THE TUGBOAT SAN JACINTO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71-900. Argued October 17, 1972—Decided December 5, 1972

Implicit in that portion of Rule 16 of the Inland Rules of Navigation that directs a moderate speed for vessels proceeding in foggy weather, and in the concomitant half-distance rule, is the assumption that vessels can reasonably be expected to be traveling on intersecting courses. On the facts of this case, it was totally unrealistic to anticipate the possibility that the vessels were on intersecting courses and the rule was not applicable. Pp. 4-7.

451 F. 2d 1369, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 71-900

Union Oil Company of California, Petitioner, *v.* The Tugboat San Jacinto et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 5, 1972]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

While proceeding up the Columbia River, the oil tanker SS *Santa Maria*, bareboat chartered by petitioner, was struck by a barge owned by respondent Oliver J. Olson & Co. The barge was being towed by the tugboat *San Jacinto*, owned by respondent Star & Crescent Towboat Co. Both vessels were damaged. Petitioner commenced this admiralty action for damages to the *Santa Maria*, and respondent cross-libeled for damages to the barge. The District Court found the collision resulted solely from negligence on the part of the crew of the *San Jacinto*, and dismissed the cross-libel. 304 F. Supp. 519 (Ore. 1969). The Ninth Circuit affirmed the finding that the *San Jacinto* had been negligent, but determined that the *Santa Maria* was also negligent in violating the "half-distance" rule, 33 U. S. C. § 192 (1970). That court therefore reversed with directions that the District Court determine the amount of damage sustained by the barge and assess damages under the divided damages rule. See *The Schooner Catharine* v. *Dickinson*, 58 U. S. 170 (1854). We granted certiorari, 405 U. S. 954 (1972), principally to consider petitioner's request that we abandon the divided damages rule. The orderly disposition of the issues

presented by the petition for certiorari, however, requires that we address ourselves to the issue of liability before reaching the question of damages. Since in so doing we conclude that the Court of Appeals was wrong in holding the *Santa Maria* liable at all, we do not reach the issue of damages.

I

On the evening of December 24, 1967, the *Santa Maria*, loaded with 17,000 tons of petroleum products, was proceeding up the Columbia River toward Portland. The ship was steaming on the Oregon side of the channel, with clear visibility. At the same time, the *San Jacinto* was proceeding downriver, towing a 275-foot barge, fully loaded with lumber, by a 250-foot towline. Proceeding on the Washington side of the channel, it had encountered foggy weather conditions upriver. As the *San Jacinto* approached Cooper Point, the *Santa Maria*, steaming upstream, sighted the tug both visually and by radar. The two vessels were more than a mile apart and on opposite sides of the 500-foot wide shipping channel. There was heavy fog, described as "tule fog," around Cooper Point, but the fog was localized on the Washington side of the channel. Although there was haze and drizzle, there was no fog on the Oregon side of the channel; the visibility from the bridge of the *Santa Maria* upstream was between one and one-half and two miles.

As the *San Jacinto* entered the fog on the Washington side off Cooper Point, the *Santa Maria* lost visual contact with the tug and barge. The *Santa Maria*'s pilot did not track the *San Jacinto* on radar, believing that the tug would remain on the Washington side of the channel and knowing that there was ample room for a port-to-port passage. At this time, the *Santa Maria* was proceeding at half-speed making approximately seven knots.

The watch on the *San Jacinto* had not sighted the *Santa Maria* when the tug entered the heavy fog off Cooper

Point. The tug's captain testified that, after entering the fog, he cut speed to three or three and one-half knots, and the visibility dead ahead was approximately 50 yards. The *San Jacinto*'s navigators were "navigating by visual sight of the Washington coast," and the captain estimated that the tug passed between 50 and 75 yards off Cooper Point. At that point, the crew of the *San Jacinto* heard one blast of a ship's horn (later discovered to have been that of the *Santa Maria*), and responded with the fog signal for a tug with a barge in tow. No visual sighting of a ship was made, however. Shortly thereafter, the captain sighted range lights, which, he testified, he thought were 20 degrees off his *starboard* bow. To avoid what he anticipated to be a momentary collision, the captain swung the *San Jacinto* to port—towards the Oregon side of the channel—and executed a U-turn, hoping to run upriver and thus avoid a collision.

The *San Jacinto* started the U-turn while still in the heavy fog, and the execution of the turn brought the tug on a course directly across that of the *Santa Maria*. The *Santa Maria* sighted the *San Jacinto* emerging from the fog, at right angles to the *Santa Maria*, at a distance of approximately 900 feet. Full astern was immediately ordered. The *San Jacinto*, quickly completing the turn, headed safely upriver. Before the *Santa Maria* could completely stop, however, the barge in tow sideslipped across the channel, crashing into the port bow of the *Santa Maria;* the force of that blow drove the tanker aground.

The District Court found that the *San Jacinto* and the barge, and those in charge of navigation, were negligent in eight respects, including navigating at excessive speed, failing to maintain a proper lookout, and "acting hastily and without sufficient cause in pulling the tow across the channel when there was adequate clearance for the tug and barge to pass port to port." The court found that

"the collision was proximately caused by the sole fault and negligence" of the *San Jacinto* and the barge, and that the acts of negligence allegedly committed by the *Santa Maria* did not "proximately [contribute] to the collision and resulting damage."

The Ninth Circuit partially reversed, holding that the *Santa Maria* was proceeding at an immoderate speed in traveling at three to seven knots "while approaching the edge of the fog bank." That court reasoned that the *San Jacinto* was only 900 feet from the *Santa Maria* when the tug emerged from the fog bank, and the *Santa Maria*'s speed was such that she could not stop within half that distance. The court, relying on *The Silver Palm*, 94 F. 2d 754 (CA9), cert. denied, 304 U. S. 576 (1937), deemed it immaterial that the visibility up the Oregon side of the channel—the direction in which the *Santa Maria* was headed—was almost two miles, because in its view the "relevant distance" for calculating the proper speed under the half-distance rule was the distance between the tanker and the fog bank—to port of the *Santa Maria*. Finding statutory fault, and ruling that petitioner had failed to prove that that fault could not have possibly contributed to the collision, see *The Pennsylvania*, 86 U. S. 125 (1874), the Court of Appeals held the *Santa Maria* liable for half the total damages.

II

The question of the liability of the *Santa Maria* turns on the application of Rule 16 of the Inland Rules of Navigation, 33 U. S. C. § 192 (1970). That Rule provides in pertinent part:

> "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at *a moderate speed*, having careful regard to the existing circumstances and conditions." (Emphasis added.)

Although the statutory test for determining the proper speed at which a vessel should proceed in a fog is phrased in general terms, our decisions have attached a well-recognized gloss to that phrase. This gloss on the statutory rule, variously referred to as the half-distance rule or the rule of sight, is that, in a fog, "a moderate speed" is that

> "rate of speed as would enable [the vessel] to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog." *The Nacoochee*, 137 U. S. 330, 339 (1890).

See also *The Colorado*, 91 U. S. 692, 702 (1890); *The Umbria*, 166 U. S. 404, 417 (1897). As stated in *The Chattahoochee*, 173 U. S. 540, 548 (1899), "[t]he principal reason for such reduction of speed is that it will give [both] vessels time to avoid collision after coming into sight of each other." If two vessels, upon sighting each other, are proceeding at a rate of speed such that each can stop before it reaches the point at which the courses of the two intersect, collision is impossible.

There can be no quarrel with the salutary purpose of this "rule of thumb." It is premised on the notion that when a ship is traveling under foggy weather conditions in waters in which other ships might be proceeding on intersecting courses, the speed of each ship must be such as to enable her to stop within half the distance separating the ships when they first sight each other. Implicit in the rule, however, is the assumption that vessels can reasonably be expected to be traveling on intersecting courses. If, on the facts of the case, it is totally unrealistic to anticipate the possibility that a vessel will travel on a particular heading that would intersect the course of another ship, the reason for the rule is rather clearly not present.

Those cases in which this Court has upheld a finding of statutory fault because of a violation of the half-distance rule involved ships proceeding in fog on established coastal shipping lanes, *The City of New York*, 147 U. S. 72 (1893); *The Nacoochee, supra;* cf. *The Colorado, supra* (Lake Huron), or ships traveling near or in a harbor, *The Umbria, supra;* cf. *The Ludwig Holberg*, 157 U. S. 60 (1895) (no fault). We do not imply that because a vessel is running near fog, as opposed to running in it, that the vessel is not required to proceed at "a moderate speed" in relation to the distance to the fog cover. That was, indeed, the circumstance in *The Silver Palm, supra*, upon which the Ninth Circuit relied. But there a naval cruiser was traveling, with clear visibility ahead but with fog banks on each side, on the busy coastal shipping lane between San Francisuo and Los Angeles. On such a course it is reasonable to expect that another ship might steam out of the fog at right angles to, and on a collision course with, the first vessel. The "rule of sight" was applicable there precisely because of the reasonable possibility that such an event might occur.

The facts of our case were significantly different. The *Santa Maria* and the *San Jacinto* were proceeding on opposite sides of a well-defined and relatively narrow channel. The *Santa Maria* had last sighted the tug only a mile ahead, proceeding along the Washington coast. Those in charge of the navigation of the tanker cannot be faulted for not anticipating the tug's totally unorthodox maneuver in darting across such a channel. *The Victory & The Plymothian*, 168 U. S. 410 (1897). The visibility in the direction in which the *Santa Maria* was headed was almost two miles. There is no evidence in the record suggesting that the speed of the tanker would have prevented her from coming to a complete halt within half the distance of sighting a vessel that was

either proceeding on a remotely foreseeable intersecting course or else being overtaken by her. The tug emerged from a fog bank only 900 feet from the tanker on a course and for reasons that no seaman could, under the circumstances, have anticipated.

The District Court's finding that any negligence on the part of the *Santa Maria* did not "proximately [contribute] to the collision" was but another way of saying that fault based on the half-distance rule must have some relationship to the dangers against which that rule was designed to protect. Here it did not. We believe that the District Court, and not the Court of Appeals, reached the correct result on the issue of liability.

Since in our view respondents alone were at fault, there is no occasion to consider how damages should be apportioned were both vessels at fault.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 71-900

Union Oil Company of California, Petitioner, *v.* The Tugboat San Jacinto et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 5, 1972]

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

On a misty Christmas eve the petitioner's oil tanker—the *Santa Maria*—was moving upstream along the Oregon side of the channel of the Columbia River. The vessel was proceeding at half speed with forward visibility of one and a half to two miles. Both visually and by radar, the tanker's pilot sighted the respondent tug, the *San Jacinto*, which was moving downstream along the Washington side of the channel more than a mile ahead. The tug, with a heavily laden barge in tow, disappeared from sight into a patch of fog. The inexperienced crew of the tug became disoriented in the fog and mistakenly thought the tanker had veered to the Washington side of the channel. To avoid what he believed would be a collision, the master of the tug executed a sharp leftward U-turn directly into the path of the oncoming tanker. While the tug successfully completed its turn, the barge swung around and smashed into the tanker, damaging her forward left side and driving her aground.

In a complaint and cross-complaint the owners of both vessels sued, each charging the other with sole blame. The District Court found that the collision was entirely the fault of the tug—in navigating at an unreasonable speed in fog, in failing to maintain a proper lookout, in failing to sound fog signals, in failing to ascertain the

risk of collision and sound the danger signal, in failing to reduce speed or take any evasive action, in failing to keep the tow in control, and in turning directly into the path of the tanker. 304 F. Supp. 519. Finding that the tanker was also at fault in proceeding at a rate in excess of that which would have allowed her to stop in one-half the visibility before her, the Court of Appeals for the Ninth Circuit modified the judgment of the District Court. 451 F. 2d 1369. Though the tug's fault was "more flagrant and shocking," *id.*, at 1374, the tanker was held liable for half the damages, since she was unable to prove that her fault could not possibly have contributed to the collision.[1]

I would reaffirm the continued vitality of the "half-distance" rule and approve its application in this case. I cannot concur in the Court's decision, which while apparently approving the "salutory purpose" of the rule, guts its certainty by making its application turn on elusive concepts such as the reasonable possibility of collision, or the particular bearing that a vessel might be expected to take on emerging from a fog bank. In short, the Court today allows a vessel to proceed at an immoderate speed, provided that its crew does not expect a collision. I cannot agree.

The half-distance rule is a rational interpretation of the command of Art. 16 of the Inland Rules that vessels shall proceed at a "moderate speed" in fog with a "careful regard to the existing circumstances and conditions." 33 U. S. C. § 192. The rule does not simply require a vessel to be able to stop in one-half the distance of her forward visibility, but rather "to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed,

[1] See *The Pennsylvania*, 86 U. S. (19 Wall.) 125, 136; *O/Y Finlayson-Forssa A/B* v. *Pan Atlantic S. S. Corp.*, 259 F. 2d 11, 22.

before she should collide with a vessel which she should see through the fog." *The Nacoochee*, 137 U. S. 330, 339.[2] As one scholar phrased the rule: "the vessels must be able to stop, not within the distance of visibility, but before they collide." J. Griffin, The American Law of Collision 295 (1949).

In this case, the crew of the *Santa Maria* knew that the *San Jacinto* had disappeared into a fog bank over a mile ahead on the Washington side of the narrow channel. The tanker nevertheless steamed ahead at half-speed as it approached the edge of the fog bank. When the *Santa Maria* sighted the tug emerging from the fog and cutting directly across its course, no more than 900 feet separated the vessels. The Court of Appeals found a violation of the half-distance rule in that the tanker could not stop within 450 feet.[3] Indeed since the tug had turned back upstream at the time of the tanker's collision with the barge, the *Santa Maria* covered considerably more than half the distance that initially separated the vessels.

I agree with the Court of Appeals that the half-distance rule was correctly applied to the facts of this case. Not only was the *Santa Maria* navigating near a fog bank in a narrow, heavily traveled shipping channel, but she actually knew that a tug was in the fog bank off the port bow; the tug might become disoriented in the fog and emerge on a collision course. And for that reason the

[2] "The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law." *The Umbria*, 166 U. S. 404, 417.

[3] The District Court appears to have assumed as much:

"It is my view that any possible violation of Article 16 of the Inland Rules by the SS *Santa Maria*, or those in charge of her navigation, were technical in nature and were not a contributing cause of the collision." 304 F. Supp., at 522.

Santa Maria should not have been proceeding at a rate in excess of the speed which would have allowed her to stop in half the distance ahead. The tug emerged from the fog and cut directly across the path of the tanker, approximately 900 feet ahead. But surely the half-distance rule does not apply only to head-on collisions. See *The Silver Palm*, 94 F. 2d 754. Moreover, the tanker here should not be any less at fault because the tug emerged tangentially to her course rather than on a head-on collision course. If the tug had altered her course in the fog and emerged steaming head on into the tanker rather than across her course—which would have been quite possible since the channel was only 500 feet wide at this point—the *Santa Maria* would still have had to stop within 450 feet. Since the tug was not closing the distance between the vessels, the tanker actually had more distance within which to stop than she would have had if the tug had followed a more orthodox collision course. The half-distance rule cannot mean that a ship can travel in the direction of a fog bank, oblivious to the possibility that another vessel might become lost there and steam out across or into the first vessel's path.

Concepts such as "reasonable expectancy," "anticipated possibility," and "reasonable possibility," do little service to the half-distance rule. "[T]he genius of the Rules for Prevention of Collision is their certainty." *Hess Shipping Corp.* v. *SS Charles Lykes*, 417 F. 2d 346, 351 (Brown, J., dissenting). The half-distance rule is effective precisely because it is a measurable rule of thumb, a nautical speed limit. Speed limits would serve no useful purpose if they only applied when there was a foreseeable probability that an accident might occur.

Since I cannot say that the Court of Appeals for the Ninth Circuit incorrectly concluded that the *Santa Maria* had violated the half-distance rule, and that she was unable to prove that her fault could not have contributed

to the collision, I would reach the question which we granted certiorari in this case to consider—the continued validity of the divided damages rule. The Court, however, does not address that question, and I therefore refrain from expressing my views upon it.